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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1107

STATE OF ALABAMA, *et al.*,

Petitioners,

v.

JERRY LEE PUGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

STATE OF ALABAMA, *et al.*,

Petitioners,

v.

JERRY LEE PUGH, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners[1] –The State of Alabama; the Alabama Board of Corrections; Judson C. Locke, Jr., individually and in his official capacity as Commissioner of the Alabama Board of Corrections; Bill Long, individually; J.O. Davis, individually and as warden of G.K. Fountain

[1]The United States Court of Appeals for the Fifth Circuit ordered the District Court, upon remand, to dissolve the injunction issued against George C. Wallace and those members of the Board of Corrections and other prison officials no longer in office. Therefore, George C. Wallace, individually and in his official capacity as Governor of Alabama, M.B. Harding, H. Couch, Yetta G. Sanford, Jr., Dr. Max V. McLaughlin, and Thomas E. Bradford, Sr., individually, do not join in this petition.

Correctional Center; Reverend John E. Vickers, Dr. Thomas F. Staton, and Dr. Marion L. Carroll, Jr., individually and as members of the Alabama Board of Corrections; J. Louis Wilkinson and W.F. Hamner, as members of the Alabama Board of Corrections; the Attorney General of Alabama; and the warden, hospital administrator, business manager, and all hospital staff of Kilby Corrections Facility (formerly Medical and Diagnostic Center, Mt. Meigs, Alabama)—respectfully pray that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceedings on September 16, 1977.

The Respondents, inmates or former inmates of the Alabama Prison System, are Jerry Lee Pugh, N.H. Newman, Worley James, Johnnie Foster, Davis Van Zandt, William Sherman Jones, William Edward Campbell, and Sherrell Speegle, for themselves and all others similarly situated.

OPINIONS BELOW

The opinion of the Court of Appeals modifying and affirming the District Court is reported as *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977). The opinion and the judgment thereon are attached hereto as Appendices A and B, respectively.

The opinion and order of the District Court formulating minimum standards for the operation of the Alabama Prison System and enjoining petitioners from failing to fully implement them is reported as *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), and is attached hereto as Appendix E.[2] The opinion and

[2] An interim order, entered jointly with the District Court for the Southern District of Alabama in *McCray v. Sullivan*, C.A. No.

[footnote continued]

order of the District Court on rehearing is dated March 5, 1976, is unreported, and is attached hereto as Appendix F.

The orders of the District Court denying some of the petitioners a jury trial on January 20, 1975, and severing respondent Pugh's claim for damages from the class action injunctive claims on June 27, 1975, are unreported, and are attached hereto as Appendices G and H, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1977 (Appendix B, *infra*, p. 25a), and timely petitions for rehearing and rehearing en banc were denied on November 7, 1977 (Appendix C, *infra*, p. 27a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Inmates of Alabama prisons filed suit under 42 U.S.C. §1983 alleging that the conditions of their confinement constituted cruel and unusual punishment. Finding that conditions in Alabama's prisons did violate their Eighth and Fourteenth Amendment rights, the District Court granted declaratory and injunctive relief which, with some modifications, the Court of Appeals affirmed. The questions presented are:

1. Whether the courts below exceeded their remedial power or abused their discretion in formulating detailed standards for the operation of the Alabama prison

5620-69-H, which prohibited the aceptance of new inmates into Alabama prisons, is unreported and is attached hereto as Appendix I.

system which went beyond the constitutional mandate and in ordering their full implementation under the continuing supervision of the court and court-appointed monitors.

2. Whether the mandatory injunction issued against the State of Alabama and the Alabama Board of Corrections violates the State's Eleventh Amendment immunity or exceeds the jurisdiction granted federal courts by 42 U.S.C. §1983.

3. Whether, in an action under 42 U.S.C. §1983 in which a jury had been demanded, the Seventh Amendment permitted the District Court, over a party's objection, to sever the damage claims and proceed to first determine the claims for declaratory and injunctive relief without a jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment VII:

"the right of trial by jury shall be preserved . . . ."

Constitution of the United States, Amendment VIII:

"nor cruel and unusual punishments inflicted."

Constitution of the United States, Amendment XI:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Constitution of the United States, Amendment XIV, §1:

"nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

United States Code, Title 42:

§1983. Civil action for deprivation of rights.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked by the filing of separate actions under 42 U.S.C. §1983 by two inmates of the Alabama Prison System, each alleging the infliction of cruel and unusual punishment. The defendants included the Commissioner and Members of the Alabama Board of Corrections and various prison officials, sued in their individual and official capacities, and the Governor of Alabama, the Alabama Board of Corrections, and the State of Alabama.

In *Pugh v. Locke*, C.A. No. 74-57-N, monetary damages and declaratory and injunctive relief were sought and a jury trial was requested. By amendment, the suit became a class action. When the prison officials and other defendants objected to the case being set for trial without a jury, the District Court, upon motion of the plaintiffs, ordered the claims for monetary damages severed from the claims for declaratory and injunctive relief, denied the request for a jury trial and consolidated the *Pugh* case with *James v. Wallace*, C.A. No. 74-203-N, which had also been amended into a class action. (Appendices G and H, *infra*, pp. 104a, 106a).

The consolidated *Pugh* and *James* cases were treated as a single action attacking both specific conditions and the totality of conditions of confinement in the Alabama prison system as constituting cruel and unusual punishment. After a non-jury trial, the District Court, in a joint order also entered by the District Court for the Southern District of Alabama in *McCray v. Sullivan*, C.A. No. 5620-69-H, a class action involving the same plaintiff classes and the same subject matter, entered an interim order prohibiting the acceptance of new inmates into Alabama prisons. (Appendix I, *infra*, pp. 108a).

Four and one-half months after trial, the District Court, finding that unconstitutional conditions did exist in the Alabama prison system, entered an order (1) enjoining Petitioners from failing to fully implement a comprehensive and detailed set of "Minimum Constitutional Standards" which the District Court had formulated, and (2) establishing and appointing a thirty-nine member "Human Rights Committee" to monitor implementation of the District Court's previous order in *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948 (1975), which dealt with medical care in Alabama prisons. The detailed standards set by the District Court appear in its order which is attached hereto as Appendix E, and the few modifications of those standards subsequently made by the District Court on motion for rehearing appear in its order of March 5, 1976, unreported, which is attached hereto as Appendix F.[3]

[3]On February 10, 1976, the District Court for the Southern District of Alabama in *McCray v. Sullivan*, C.A. No. 5620-69-H, unreported, also entered its order finding conditions in the Alabama prison system to be violative of the Constitution, but specifically refusing "to direct the exact means or method to be pursued" in correcting those conditions. (Appendix J, *infra*, p. 116a).

[footnote continued]

The Court of Appeals affirmed and remanded (Appendices A and B, *infra*, pp. 1a, 25a) permitting, with certain exceptions, the standards fixed by the District Court to remain, although it recognized that those requirements related to work and recreational opportunities are without any constitutional foundation and that other requirements may also go beyond the constitutional mandate. The District Court was directed to substitute a lesser number of monitors for the thirty-nine member Human Rights Committee to insure compliance with its standards. The Court of Appeals also allowed the injunction to remain in effect as to the State of Alabama and the Alabama Board of Corrections and directed that the compensation and expense of the Human Rights Committee and the monitors to be appointed upon remand be recovered from the State of Alabama.

Petitions by all parties for rehearing were denied (Appendix C, *infra*, p. 27a), but Petitioners' motion for stay of the issuance of the mandate pending the filing of this petition was granted because of the importance of the issues (Appendix D, *infra*, p. 29a).

REASONS FOR GRANTING THE WRIT

I.

FEDERAL COURT SUPERVISION OF A STATE'S PRISON SYSTEM

The remedial order issued by the District Court has been described as "the most expansive intrusion yet by a federal court into the management of state penal facilities,"[4] and it conflicts, at least in principle, with recent decisions of this Court which re-emphasized the necessity of federal courts' giving appropriate consideration to principles of equity, comity and federalism. *Rizzo v. Goode,* 423 U.S. 362 (1976); *Preiser v. Rodriguez,* 411 U.S. 475 (1973).

While a federal court's equitable power to remedy past wrongs is broad, its "judicial power may be exercised only on the basis of a constitutional violation." *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971). The District Court characterized its requirements as "constitutional minimum standards," but the Court of Appeals did not consider them as such and recognized that many did or might exceed the constitutional mandate. By permitting the District Court, nevertheless, to go beyond its obligation to insure that constitutional limits are not exceeded and fully implement standards lacking specific constitutional foundation, the Court of Appeals allowed the District Court to act as legislator and prison administrator rather than as judge. The courts below clearly went beyond attempts to correct conventional notions of cruel and unusual punishment and entered

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[4]Robbins & Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration under the Eighth Amendment,* 29 Stan. L. Rev. 893, 916 (1977).

into the non-constitutional and extra-judicial realm of prison reform. This extension of the power of federal courts into the administering of State prisons so far departs from the accepted and usual course of judicial proceedings and the controlling precepts of federalism in determining the availability and scope of equitable relief as to call for an exercise of this Court's power of supervision.

The appointment by the District Court of federal monitors for Alabama prisons to insure their compliance with the standards is also without precedent in this Court and is unauthorized by any provision of the Federal Rules of Civil Procedure. In *Vermont v. New York,* 417 U.S. 270 (1974), this Court rejected the appointment of a special master to police the execution of a settlement, citing with approval its previous expression in *Nebraska v. Wyoming,* 325 U.S. 589 (1945), that "continuing court supervision over decrees of equitable apportionment of waters was undesirable." The decision of the Court of Appeals below also reveals that the "monitors" called for are not intended to operate in the same manner as masters provided for by the Federal Rules. In fact, the Fifth Circuit has recently described the monitors in this case as "ombudsmen." *Miller v. Carson,* 563 F.2d 741 (5th Cir. 1977).

The question of how far a federal court may go in fashioning equitable remedies for the erradication of cruel and unusual punishment in State prison systems presents an important question of federal law and one of immediate concern which has not been, but should be now, settled by this Court. The constitutionality of some twenty or more state prison systems, including every state in the Fifth Circuit, is presently being

litigated.[5] Judge Coleman, the author of the Court of Appeals' opinion below, in granting the petitioners a stay of issuance of the mandate pending the filing of this petition, stated:

> "This stay is granted because the undersigned is of the opinion that the issues in this appeal are extremely important and a decision by the Supreme Court would clarify many issues of state prison administration." (Appendix D, *infra*, p. 30a).

Thus, the issue is important to the parties, to the States whose prison systems are or may yet come under attack and to the inmates incarcerated in them, to the citizens whose attitudes determine what is cruel and unusual punishment and whose tax monies must be applied to remedy it, and to the federal courts[6] whose remedies should uphold the constitutional mandates but reflect

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[5]Including: *Harris v. Cardwell*, 75-185 (D. Ariz.); *Anderson v. Redmond*, No. 76-364 (3rd Cir.) (Del.); *Costello v. Wainright*, No. 72-109-Civ (M.D. Fla.); *Hardwick v. Ault*, C.A. 75-139 (M.D. Ga.); *Burbank v. Walker*, 76-C-4471 (N.D. Ill.); *Lightfoot v. Walker*, CV-73-238-E (E.D. Ill.); *United States v. Thompson*, CV No. 76-0158 (S.D. Ill.); *French v. Raines*, I-P-75-677-C (S.D. Ind.); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (La.); *Nelson v. Collins*, V-77-116 and *Johnson v. Levine*, H-77-113 (D.C. Md.); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (Miss.); *Burks v. Graham*, No. 77-4008-CV-C (W.D. Mo.); *Bolding v. Holshouser*, N. 76-2151 (4th Cir.) (N.D.); *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977); *Mattison v. South Carolina*, C.A. 76-318 (D.S.C.); *Trigg v. Blanton*, No. 8-6057 (Chancery Court, Davidson Co., Tenn., Part 1); *Ruiz v. Estelle*, C.A. No. 5523 (E.D. Tex.).

[6]The District Court for the Southern District of Alabama in *McCray v. Sullivan*, C.A. No. 5620-69-H, unreported, refused to intervene and specify the exact means or methods to be used in correcting the unconstitutional condition in the prisons, stating that such duties are "the province and burden of the State and those departments responsible . . . ." (Appendix J, *infra*, p. 116a).

the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." *Rizzo v. Goode*, 423 U.S. 362 (1976).

II.

SUIT AGAINST THE STATE OF ALABAMA

The issuance of a mandatory injunction against the State of Alabama and the Alabama Board of Corrections violated Alabama's Eleventh Amendment immunity and directly contradicted this Court's decisions in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *Edelman v. Jordan*, 415 U.S. 651 (1974), and *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U.S. 459 (1944). These cases hold that the Eleventh Amendment denies federal courts authority to entertain suits by private parties against a State or State agency, if under State law the real party in fact is the State itself, unless it has given its consent to to be sued. Section 14 of the Alabama Constitution provides the "the State of Alabama shall never be made a defendant in any court of law or equity," and, consequently, no person or authority has the power to consent to a suit against the State. *Dunn Construction Co. v. State Board of Adjustment*, 234 Ala. 372, 175 So. 383 (1937). The prohibition against such suits extends to State agencies such as the Board of Corrections. See *White v. Alabama Insane Hospital*, 138 Ala. 479, 35 So. 454 (1903); *State v. Louis Pizitz Dry Goods Co.*, 243 Ala. 629, 11 So.2d 342 (1943).

The grant of an injunction against the State and the Board of Corrections in an action based upon 42 U.S.C. §1983 is in direct conflict with decisions of other courts of appeal which hold that neither a State nor a

State agency is a "person" within the meaning of the statute and amenable to suit under it. *Meredith v. Arizona,* 523 F.2d 481 (9th Cir. 1975); *Curtis v. Everette,* 489 F.2d 516 (3rd Cir. 1973). The decisions below conflict, at least in principle, with this Court's holding in *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), that municipalities are not "persons" under 42 U.S.C. §1983.

The Court of Appeals directed the District Court to compensate its monitors by rendering judgments against the State of Alabama for costs. As noted above, the District Court has no authority or jurisdiction to enter a judgment against the State in these proceedings and, in addition, the payment of such salaries and expenses would not fall within the exceptions of *Edelman v. Jordan,* 415 U.S. 651 (1974) and *Ex Parte Young,* 209 U.S. 123 (1908).

It is essential that the Court act, not only because the State of Alabama itself has been specifically ordered in this case to pay the compensation and expenses of the monitors and the Human Rights Committee, but because by the use of such injunctions federal courts may place themselves in positions of control over States as soverign entities rather than over particular officials who may only be compelled to perform their delegated functions in a constitutional manner. The issuance of the injunction against the State is neither accidental nor incidental, and unless addressed now by this Court, even more serious confrontations between the federal judiciary and the States in this and other actions can be expected.

III.

DENIAL OF JURY TRIAL

The action of the District Court, sanctioned by the Court of Appeals, in allowing the plaintiffs to avoid a jury trial by severing the class representative's individual claim for damages, dropping the claims for class damages without notice to the class, and proceeding to trial on the declaratory judgment and injunctive aspects of the case without a jury, is in clear violation of this Court's rulings on Seventh Amendment rights in *Curtis v. Loether,* 415 U.S. 189 (1974), *Ross v. Bernhard,* 396 U.S. 531 (1970), *Dairy Queen, Inc. v. Wood,* 369 U.S. 569 (1962), and *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

The plaintiffs in *Pugh v. Locke,* C.A. No. 74-57-N, asked for monetary, declaratory and injunctive relief, all based upon a common set of allegations and facts, and the District Court later noted that "the questions of law and fact, presented by the named plaintiffs are common to the class, as are the claims presented by the class representatives . . ." *Pugh v. Locke,* 406 F. Supp. 318 (M.D. Ala. 1976) (Appendix E, *infra,* pp. 33a-34a). Assuming, as the District Court did, that a jury trial would be available on a damage claim under 42 U.S.C. §1983,[7] a jury trial would also be available on the same issues under a prayer for a declaratory judgment. *Beacon Theatres, Inc. v. Westover, supra.* Similarly, the addition of a request for injunctive relief would not

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[7] This Court has analogized cases under 42 U.S.C. §1983 to traditional tort actions. *Pierson v. Ray,* 398 U.S. 547 (1967); *Monroe v. Pape,* 365 U.S. 167 (1961). It is also held that a jury trial could be obtained in an action under 42 U.S.C. §3612 where both damages and injunctive relief was sought. *Curtis v. Loether,* 415 U.S. 189 (1974).

authorize a non-jury trial on the legal issues involved. *Curtis v. Loether, supra.* This Court's decisions in *Beacon* and *Dairy Queen* also require that in cases of this nature, where equitable and legal issues are joined, the issues common to both claims must be tried by a jury prior to determination of the equitable claims. The opposite was done below.

The importance of this issue to the individual petitioners here cannot be over-emphasized, since the damage claims against them have not been resolved. Nevertheless, of even greater consequence is the effect which this procedure for isolating the demand for a jury trial may have upon the multitude of class action prison suits now pending around the country. Are State officials who are defendants in actions brought under 42 U.S.C. §1983 not to be afforded a single jury trial on issues common to both legal and equitable claims where both damages and an injunction are sought? Conversely, where the questions of fact are common to the named plaintiffs, the class representatives, and the class as a whole, can State officials be put to trial twice on the same issues because of a severance of claims made to avoid a jury trial? This Court has noted that "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care," *Demick v. Schiedt,* 293 U.S. 474, 486 (1934), and we respectfully submit that a condemnation of the procedure used in this case to avoid a jury trial is necessary to the meaningful preservation of jury trials in §1983 actions and even in other actions where both monetary damages and injunctive relief are claimed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

[5847]

N. H. NEWMAN et al.,
Plaintiffs-Appellees,

v.

STATE OF ALABAMA et al.,
Defendants-Appellants.

Jerry Lee PUGH, for himself and others similarly situated,
Plaintiffs-Appellees,

v.

Judson C. LOCKE, Jr. and State of Alabama, et al.,
Defendants-Appellants.

Worley JAMES et al.,
Plaintiffs-Appellees,

v.

George C. WALLACE et al.,
Defendants-Appellants.

No. 76–2269.

United States Court of Appeals,
Fifth Circuit.

Sept. 16, 1977.

[5849] Appeals from the United States District Court for the Middle District of Alabama.

Before COLEMAN, Circuit Judge, KUNZIG *, Judge, and GEE, Circuit Judge.

COLEMAN, Circuit Judge.

[1] The Eighth Amendment to the Constitution of the United States, reinforced by the Fourteenth Amendment, prohibits the imposition of cruel and unusual punishment. It is much too late in the day for states and prison authorities to think that they may withhold from prisoners the basic necessities of life, which include reasonably adequate food, clothing, shelter, sanitation, and necessary medical attention, *Gates v. Collier*, 5 Cir., 1974, 501 F.2d 1291; *Newman v. Alabama*, 5 Cir., 1974, 503 F.2d 1320, *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102; *Williams v. Edwards*, 5 Cir., 1977, 547 F.2d 1206.

[5850] [2] It should not need repeating that compliance with constitutional standards may not be frustrated by legislative inaction or failure to provide the necessary funds, *Gates v. Collier, supra*, at 1319; *Smith v. Sullivan*, 5 Cir., 1977, 553 F.2d 373.

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* Judge of the United States Court of Claims, sitting by designation.

[3–5] On the other hand, lawful incarceration necessitates withdrawal of or limitations upon many individual privileges and rights. A prisoner does not retain constitutional rights that are inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Wide ranging deference must be accorded the decisions of prison administrators. They, and not the courts, must be permitted to make difficult judgments concerning prison operations, *Jones v. North Carolina Prisoners' Labor Union, Inc.* [1977], —— U.S. ——, 97 S.Ct. 2532, 53 L.Ed.2d ——. In his concurring opinion in *Jones*, Mr. Chief Justice Berger wrote that in penal matters the federal courts may not "second guess" legislatures and prison administrators except in the most extraordinary circumstances.

The present case is somewhat similar to *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561. There petitioners claimed that the judgment of the District Court represented an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions. The Supreme Court found itself "substantially in

agreement with th(*o*)se claims", at 366, 96 S.Ct. at 602. The case involved an "assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers".

The Supreme Court said,

> "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law'. * * * Even in an action between private individuals, it has long been held that an injunction is 'to be used sparingly, and only in a clear and plain case'."

The Court concluded that when the District Court injected itself into the internal disciplinary affairs of the Philadelphia Police Department, a state agency, it had departed from the controlling precepts of federalism in determining the availability and scope of equitable relief. The judgment of the Court of Appeals affirming the decree of the District Court which directed the imposition of a comprehensive program for dealing adequately with civilian complaints was reversed.

This does not mean that Constitutional standards are not to be scrupulously observed or that the statutes designed to enforce that objective are to be denied full effect. It does mean in the prison context that federal courts should keep their eyes on the main objective, the Eighth Amendment command for the eradication of cruel and unusual punishment. The remedy must be designed to accomplish that goal, not to exercise judicial power for the attainment of what we as individuals might like to see accomplished in the way of ideal prison conditions. There are those who would argue that imprisonment in any form is cruel and unusual. The Amendment, however, recognizes the right to punish for criminal conduct as long as that punishment does not escalate to the cruel and unusual.

For example, we have held that visitation privileges are matters subject to the discretion of prison officials, *McCray v. Sullivan*, 5 Cir., 1975, 509 F.2d 1332, [5851] 1334.

Failure of prison authorities to provide a rehabilitation program does not by itself constitute cruel and unusual punishment, *Ibid*, at 1335.

[6] Federal courts are extremely reluctant to limit the freedom of prison officials to classify prisoners as they, in their broad discretion, may deem appropriate, *Ibid*, at 1334; *Young v. Wainwright*, 5 Cir., 1971, 449 F.2d 338.

State penitentiaries are occupied by convicted felons, either ineligible for or found to be unworthy of probation. By its very nature, the operation of such a prison is a dangerous undertaking. Time and time again, experience has dramatically taught that the management and control of prisons, the prevention of mass violence within prisons, and the safe retention of convicts within prison walls, present problems of the first magnitude, in which failures occur all too often, as recently demonstrated at Brushy Mountain, Tennessee. There was intense nationwide interest when a notorious prisoner escaped but not much concern had previously been shown for the problems of prison officials in trying to hold him inside the walls.

[7] The authority to manage and control a felony prison should never be unduly restricted or divided. That authority must repose in one well identified place, limited only by the requirements of the law.

I

This appeal is concerned with the remedies prescribed by the very able District Court for the eradication of cruel and unusual punishment in the Alabama State Prison System, *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala., 1976). At the federal level this involves a comparatively new field of the law. It was not until 1962 that the Supreme Court applied the Eighth Amendment ban to the states through the Fourteenth Amendment, *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758.

The State concedes that the evidence established excessive overcrowding in these prisons, that there were not sufficient guards to reasonably protect the inmates from one another, and that the overcrowding was primarily responsible for and exacerbated all the other ills of the penal system. As detailed in its published opinion, other indefensible conditions were found by the District Court, findings clearly supported by the evidence.

At the outset, then, the case is reduced to a constitutional appraisal of the remedies required of the State. The State contends that in fashioning those reme-

dies the District Court "exceeded its judicial power and abused its discretion".

[8] Our first response is that the determined efforts of the highly dedicated District Judge to put an end to unconstitutional conditions in the Alabama prison system merit high commendation. We cannot believe that the good people of a great state approved the prison situation demonstrated by the evidence in this case. We note, too, that for more than a year funds for an entirely new prison have been available as the result of legislative action, which is likewise commended. A state has no higher duty than the preservation of its governmental integrity by the enforcement of its own laws, which inescapably includes the maintenance of an effective state prison system. This Court expresses the hope that the difficulties encountered in naming a location for the new prison will be speedily resolved.

[5852] [9] Our real issue is whether in striving to attain constitutional objectives the District Court in a few respects went impermissibly beyond the requirements of the federal constitution; more specifically, did the Court supersede the duly constituted state authorities in the performance of vital state functions rather than *compelling* those authorities to perform those functions in a constitutional manner? We all understand, of course, that federal courts have no authority to address state officials out of office or to fire state employees or to take over the performance of their functions. Most assuredly, however, in proper cases a federal court can, and must, compel state officials or employees to perform their official duties in compliance with the Constitution of the United States.

[10] At the outset we hold that the steps taken by the District Court to ensure reasonably adequate food, clothing, shelter, sanitation, necessary medical attention, and personal safety for the prisoners were within its sound discretion and will not be disturbed on appeal. Some of the steps in regard to these matters, if considered in isolation, may have gone beyond constitutional mandates but they were justifiably invoked for the eradication of Eighth Amendment conditions. We do not pause to discuss a number of state contentions which are foreclosed by our opinion in *Williams v. Edwards*, 5 Cir., 1977, 547 F.2d 1206, decided after this appeal was filed and briefed.

There are a few features of the case, however, in which we are of the opinion that less intrusive, but equally effective, measures should have been taken by the District Court. An adjustment of these matters within constitutional bounds should not hamper or impede the attainment of an effective, constitutionally operated state penal system. As to these matters, we think some modifications are in order. With those modifications, the judgment of the District Court will be affirmed and the case remanded for further proceedings not inconsistent herewith.

II

[11] Unless intended to apply only to existing facilities we do not discern the constitutional basis for the requirement that Alabama state prisoners shall be housed in individual cells, nor can we agree that "design" standards, *without more*, amount to a *per se* constitutional limitation on the number of prisoners which may be housed in a particular prison facility. Those who design prisons are not vested with either the duty or the power to prescribe constitutional standards as to prison space. Assuming that the District Court intended these

limitations to apply only to presently existing prisons and not to those hereafter to be constructed the judgment in these respects is affirmed.

The Court required that all new prison construction should provide sixty square feet of space per prisoner. We remand this requirement to the District Court for further consideration in the light of our opinion in *Williams v. Edwards*, 547 F.2d, at 1215.

III

The District Court established and appointed a "Human Rights Committee", composed of 39 individuals. Whether they were qualified by training or experience in the operation of a state prison system is not shown. At State expense, the Committee was authorized to employ a fulltime staff consultant, other specialists, and a fulltime clerk-stenographer. The Committee members were to be
[5853 compensated at the same rate as that paid the Alabama State Board of Corrections.

The Committee was authorized to monitor implementation of the standards prescribed by the Court's decree as well

as those prescribed in *Newman v. Alabama*.[1] The Order provided that

> "[T]he Committee may at reasonable times inspect the state prison facilities, interview inmates, and inspect institutional records. The Committee shall review plans for implementation of this decree to ensure that they comport with minimum standards set forth. . . . . The Committee shall be authorized to take *any action* [emphasis added] reasonably necessary to accomplish its function."

Our initial reaction is that "reviewing plans for implementation of this decree to ensure that they comport with minimum standards set forth" could more properly have been assigned to the magistrate or to a master, qualified to hold hearings, make findings of fact, and report to the Court for its approval or disapproval. Moreover, the authority to "*take any action*", with no accompanying standards or limitations, could amount, in practical effect, to turning the administration of the prisons over to the Committee, as, in some respects, appears to have occurred.

1. D.C., 349 F.Supp. 278, *affirmed in part*, 5 Cir., 1974, 503 F.2d 1320, *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102.

It may be that in setting up the Committee the Court had in mind the appointment of numerous biracial committees in school desegregation cases. The analogy is not altogether inapposite but we are not aware of any school desegregation decree in this Circuit which authorized such committees to do more than assemble information, confer, advise, and make representations to the school board and the court. They did not participate in "day to day" school operations, they received no compensation, and their function did not have either the appearance or the effect of superseding school boards or faculties in the daily administration of the school systems. Additionally, the circumstances surrounding the operation of schools are quite different to those prevailing in the operation of a penitentiary.

The State asserts, and it is not disputed, that in a number of instances prison authorities and their counsel were *not* notified of meetings between committee members and the District Court with reference to prison operations; therefore, state counsel were unable to participate or to be heard.

The State further asserts that the Committee impermissibly interfered with the Alabama Board of Corrections and its duly authorized agents in the exercise of powers and duties exclusively conferred upon them by Alabama law.

We have examined numerous letters appearing in the printed Appendix, signed by the Chairman of the 39 member Committee, addressed to the Alabama Board of Corrections or its agent, in which the addressees were directed to take specified action in regard to certain matters. These letters state that they were written at the direction of the District Court.

From the record, we are left with the firm conviction that the Committee undoubtedly did impermissibly intrude, and had every appearance of impermissibly intruding, upon functions properly belonging to the daily operation of the Al-

[5854] abama prison system. Prison officials cannot be expected to perform in an efficient or an effective manner if they are required to stay in line with so numerous a Committee, at the same time constantly confronted with the spectre of federal contempt of court.

[12] This is not to say that the District Court could not take and should not have taken appropriate steps to ensure compliance with its remedial decree. We think, however, that a more reasonable, less intrusive, more effective approach would have been to name one monitor for each of the prisons involved, with full authority to *observe*, and to report his *observations* to the Court, with no authority to intervene in daily prison operations.

The use of a single monitor was the approach, not disapproved by this Court, in *Gates v. Collier, supra.*

The oversight of the proposed monitors might well be placed in the hands of a magistrate or a master, who could deal with alleged, but disputed, non-compliance in findings of fact and conclusions of law, subject to the ultimate decision of the District Judge, where appropriate.

By the single monitor method, the prison authorities will be diverted from the execution of their duties to the extent of conferring and cooperating with only one court-authorized individual. As a matter of fact, informal conferences between the warden and only one individual holding a charter from the Court

would likely put an end to many problems without any necessity for further reference.

Such a monitor should be a person of undeniable qualifications, carefully chosen, hopefully with experience in the operation of a state or federal prison system which has not been in litigation over failure to abide by the Constitution.

Upon remand, and no later than thirty days from the receipt of our mandate, the District Court should dissolve the 39 member Committee and its functions should be terminated. The Court should name a monitor for each of the prisons which are the subject of the remedial decree. The guidelines for the monitors, and the duties of the prison authorities as to their cooperation with those monitors, should be specifically spelled out by an appropriate order so that none of those involved will suffer any reasonable doubt as to what is required of both monitors and prison officials.[2]

When so appointed, and their functions defined, the monitors may be paid

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2. It may be that one monitor could adequately take care of more than one prison. If so, the District Court may act accordingly.

reasonable compensation, consistently with their qualifications and experience, to be recovered from the State of Alabama as a part of the reasonable costs of this litigation.

Since the order appointing the 39 member Committee was not void *ab initio* the compensation and expense of its members and staff as heretofore fixed by the District Court will stand undisturbed, to be paid by the State as a part of the costs of this critically important litigation.

IV

Appellants complain vigorously of the actions of the District Court in assigning a major role in the classification of prisoners to the Prison Classification Project of the University of Alabama. In response to an inquiry propounded by this
[5855] Court through appropriate judicial channels we are now in possession of an order entered by the District Court on July 19, 1977, in which the Court adjudged that the University of Alabama group is no longer functioning insofar as these cases are concerned. That being true, we find this aspect of the appeal to be moot. We make no comment thereon

except to say that we understand the classification of prisons in the Alabama prison system will hereafter proceed under the control and direction of the duly constituted Alabama prison authorities, with no interference or participation by any outside group, saving, of course, the right of the District Court by appropriate measures, if needed, to see to it that constitutionally required classification standards, if any, are observed by the prison authorities in the exercise of a function which is fundamentally theirs, *McCray v. Sullivan*, 5 Cir., 1975, 509 F.2d 1332.

V

[13] Failure of prison authorities to provide a rehabilitation program, by itself, does not constitute cruel and unusual punishment, *McCray v. Sullivan*, 5 Cir., 1975, 509 F.2d 1332, 1335.

[14, 15] Amicus Curiae, the United States, concedes that there is no constitutional right to rehabilitation for prisoners. It does proceed to argue, however, that "states have a duty to insure that the mental, physical, and emotional status of prisoners in their custody do not deteriorate". On the face of it, this

is not a well considered statement. The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it. We think that what the government must have meant is that states may not inflict cruel and unusual punishment that would likely lead to such results. The briefs for the parties plaintiff and for the State of Alabama deal with this idea to considerable length. We decline to enter this uncharted bog. If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration.

Even so, on the facts of this case, we affirm the actions of the District Court designed to provide Alabama prison inmates with reasonable recreational facilities. We do this simply because such facilities may play an important role in

extirpating the effects of the conditions which undisputably prevailed in these prisons at the time the District Court entered its order.

VI

[16] The District Court directed that inmates should be allowed to receive visitors on at least a weekly basis. Under our decision in *McCray v. Sullivan*, we feel that visitation regulations should be left to the prison authorities, wisely adapted to individual circumstances if their sound discretion should so dictate, or included in general rules which will allow prisoners reasonable visitation.

[17] The Court further directed that visitors should not be "subjected to any unreasonable searches". Of course, no citizen not a prisoner may be subjected to unreasonable searches. Even so, within a prison the prime consideration
[5856] is the preservation of the safety and security of the prison, including the exclusion of contraband. Prison authorities have both the right and the duty by all reasonable means to see to it that visitors are not smuggling weapons or other objects which could be used in an effort to escape or to harm other prisoners.

They have a duty to intercept narcotics and other harmful contraband. This is no more an intrusion on the rights of visitors than the requirement that persons about to board commercial aircraft shall have their persons and baggage electronically searched for the purpose of determining that they are not carrying weapons, *United States v. Cyzewski*, 5 Cir., 1973, 484 F.2d 509, *cert. denied*, 415 U.S. 902, 94 S.Ct. 936, 39 L.Ed.2d 459. That which would be unreasonable in the outside world may be indispensable within a prison.

Additionally, we conclude that prison authorities should not be required to maintain prison security with one eye on the subject and the other on the consequences of contempt, in which the District Court could convert a warden into prisoner. If abuses actually exist, there are other remedies less likely to interfere with the ongoing safety of the prison.

Upon remand the District Court should eliminate this item from its decree, reserving the right to take the necessary action with reference to actual abuses if they persist to an extent justifying injunctive relief.

VII

The injunction included the Governor of Alabama. Our examination of the record indicates that he has no hand in the operations of the Alabama penal system beyond the customary budget recommendations to the legislature and the appointment of the Alabama Board of Corrections. The statute vests all power and control in the Board. Upon remand, the District Court should dissolve the injunction entered against the Governor. The same action should be taken as to those members of the Board and other prison officials who are no longer in office and thus have no further responsibility for the implementation of the Court decree. To the extent herein approved, the injunction will, of course, remain in full force and effect as to those actually running the system until such time as it may be shown in the District Court that the prisons are being operated in a constitutional manner. That the Court should remove itself from prison operations at the earliest date consistent with the vindication of constitutional rights is no doubt well known to the District Court.

VIII

[18] The District Court directed that each prisoner shall be assigned to a meaningful job on the basis of his or her abilities and interests, and according to institutional needs. While there is no federal constitutional mandate for this proviso, as phrased it should not impose any real burden on the penitentiary authorities, so, in the context of this case we allow it to stand, not, however, to enjoy any precedential status in future cases if they should arise.

[19] We interpret those portions of the Order dealing with opportunities to obtain a basic education, to attend vocational school, and to attend a transitional program prior to release as meaning that if the prison authorities operate such programs each prisoner shall have impartially equal access on an objective standard of basic utility to the individual. We would find it difficult to hold, and we do not now hold, that if the state has no such programs it amounts to cruel and unusual punishment within the prohibitions of the Eighth Amendment. As
[5857] a matter of fact, in the operation of a good prison system, we understand that such programs are fairly standard practices, instituted and operated on the initiative of state prison authorities.

Conclusion

With the modifications herein enumerated, the judgment of the District Court is affirmed. The case is remanded for further proceedings consistent herewith and for such other and further action as the District Court, pending the termination of this litigation, may find it necessary to take for the vindication of Eighth Amendment rights.

AFFIRMED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 76-2269

D.C. Docket Nos. CA-3501-N,
CA-74-57-N & CA-74-203-N

N.H. NEWMAN et al.,
Plaintiffs-Appellees,

v.

STATE OF ALABAMA et al.,
Defendants-Appellants.

Jerry Lee PUGH, for himself and
others similarly situated,
Plaintiffs-Appellees,

v.

Judson C. LOCKE, Jr. and State of
Alabama, et al.,
Defendants-Appellants.

Worley JAMES et al.,
Plaintiffs-Appellees,

v.

George C. WALLACE et al.,
Defendants-Appellants.

Appeals from the United States District Court for the
Middle District of Alabama

Before COLEMAN, Circuit Judge, KUNZIG*, Judge, and GEE, Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

September 16, 1977

Issued as Mandate:

*Judge of the United States Court of Claims, sitting by designation.

APPENDIX C

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

November 7, 1977

EDWARD W. WADSWORTH
CLERK

TO ALL PARTIES LISTED BELOW:

NO. 76-2269 – NEWMAN v. STATE OF ALABAMA

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH, Clerk
By /s/ Brenda M. Hauck
Deputy Clerk

**on behalf of all parties,

cc: Mr. William J. Baxley
Mr. Larry R. Newman
Mr. Robert S. Lamar, Jr.
Mr. W. Scears Barnes, Jr.
Messrs. Thomas S. Lawson, Jr.
William K. Martin
Mr. John C. Hoyle
Mr. Robert D. Segall
Mr. Joseph J. Levin, Jr.
Mr. George Peach Taylor
Messrs. Alvin J. Bronstein
Matthew L. Myers
Messrs. Walter W. Barnett
Stephen A. Whinston

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
[Filed NOV 28, 1977]

NO. 76-2269

N.H. NEWMAN, et al.,
Plaintiffs-Appellees,

v.

STATE OF ALABAMA et al.,
Defendants-Appellants.

Jerry Lee PUGH, for himself and
others similarly situated,
Plaintiffs-Appellees,

v.

Judson C. LOCKE, Jr. and State of
Alabama, et al.,
Defendants-Appellants.

Worley JAMES et al.,
Plaintiffs-Appellees,

v.

George C. WALLACE et al.,
Defendants-Appellants.

Appeals from the United States District Court for the
Middle District of Alabama

O R D E R:

The motion of the appellants for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED.

The stay shall continue in force until the final disposition of the case by the Supreme Court, provided, however, that within the period prescribed for the filing of the petition there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the petition for certiorari has in fact been filed.

The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, as the case may be.

This stay is granted because the undersigned is of the opinion that the issues in this appeal are extremely important and a decision by the Supreme Court would clarify many issues of state prison administration.

This November 25, 1977.

/s/ J.P. Coleman
UNITED STATES
CIRCUIT JUDGE

APPENDIX E

[318] **Jerry Lee PUGH, for himself and all others similarly situated, Plaintiffs,**

v.

Judson C. LOCKE, Jr., individually and in his official capacity as Commissioner of the Alabama Board of Corrections, et al., Defendants.

WILCOX COUNTY COMMISSION, as the governing body of the County of Wilcox, State of Alabama, and all other counties similarly situated, and Association of County Commissions of Alabama, a voluntary association, Intervening Ancillary Plaintiffs,

v.

Melba Till ALLEN, individually and as State Treasurer, State of Alabama, et al., Ancillary Defendants,

Ira DeMent, United States Attorney, Amicus Curiae.

Worley JAMES et al., Plaintiffs,

v.

George C. WALLACE, individually and in his official capacity as Governor of Alabama, et al., Defendants.

WILCOX COUNTY COMMISSION, as the governing body of the County of Wilcox, State of Alabama, and all other counties similarly situated, and Association of County Commissions of Alabama, a voluntary association, Intervening Ancillary Plaintiffs,

v.

Melba Till ALLEN, individually and as State Treasurer, State of Alabama, et al., Ancillary Defendants,

The National Prison Project of the American Civil Liberties Union Foundation, Inc., and Ira DeMent, United States Attorney, Amici Curiae.

Civ. A. Nos. 74-203-N, 74-57-N.

United States District Court,
M. D. Alabama, N. D.

Jan. 13, 1976.

[321] MEMORANDUM OPINION

JOHNSON, Chief Judge.

In these consolidated class actions,[1] plaintiffs seek declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 for deprivation of their Eighth and Fourteenth Amendment rights. This Court has jurisdiction under 28 U.S.C. §§ 1343, 2201 and 2202. This Court, as authorized by Rule 52 of the Federal Rules of Civil Procedure, incorporates in this memorandum opinion the appropriate findings of fact and conclusions of law.

[1] The Court finds that these actions are maintainable as class actions under Federal Rule 23(a) and (b)(2). The class is composed of all persons presently confined by the Alabama Board of Corrections or who may be so confined in the future. The Court finds that the class is so numerous that joinder is impracticable; that the questions of law

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1. These class actions were consolidated on June 27, 1975, and tried together. Following trial of these cases, the pleadings in *Pugh* were amended to conform to the evidence, and the relief requested is now essentially identical to that requested in *James*. Consequently, this order will be entered in both cases. See Fed. R.Civ.P. 15(b).

and fact presented by the named plaintiffs are common to the class, as are the claims presented by the class representatives; and that the competent representation provided the named plaintiffs will adequately protect the interests of the class as a whole. The Court further finds that the defendants in both cases have acted and refused to act on grounds applicable to the class, for which both declaratory and injunctive relief are appropriate. The defendants, sued in their individual and official capacities, are the Governor of Alabama, the Commissioner of the Alabama Board of Corrections,[2] the Deputy Commissioner of the Alabama Board of Corrections, the members of the Board of Corrections, the Warden of Kilby Corrections Facility,[3] and the Warden of G. K. Fountain

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2. The original defendant, Commissioner L. B. Sullivan, left office during the pendency of these actions. His successor, Judson C. Locke, Jr., replaces Sullivan as a defendant. See Fed.R.Civ.P. 25(d).

3. Kilby Corrections Facility was formerly Mt. Meigs Medical and Diagnostic Center. The name of the institution was changed by Act of the Alabama Legislature during the pendency of these actions.

Correctional Center. The predecessors in office of these defendants, who were sued in their individual and official capacities, are retained as individual defendants. The Court has also had the able assistance of United States Attorney Ira DeMent and the American Civil Liberties Union National Prison Project, as amici curiae.

The complaint in *Pugh v. Locke* was originally filed by an inmate of G. K. Fountain Correctional Center on February 26, 1974. The amended complaint was filed by court-appointed counsel on April 16, 1974, seeking declaratory, in-
[322] junctive and monetary relief for the alleged failure of defendants to adequately protect the plaintiff class from violence on the part of other inmates. The complaint was filed on behalf of a class composed of all inmates of the state penal system who have been or may be confined to G. K. Fountain Correctional Center and who have been, are, or may be subjected to such violence. At the request of plaintiffs, the claims for monetary damages were severed by order of June 27, 1975. The action proceeded on the claims for declaratory and injunctive relief.

The original complaint in *James v. Wallace* was filed on June 21, 1974. An amended complaint was filed thereafter on July 29, 1974, by court-appointed counsel. That complaint, on behalf of all inmates incarcerated in state penal institutions, essentially alleges that defendants fail to provide adequate rehabilitation opportunities for inmates, maintain conditions in these institutions which make rehabilitation impossible, and provide the opportunities that do exist in an unequal manner—all in violation of plaintiffs' Eighth and Fourteenth Amendment rights.

After extensive pretrial discovery by parties and amici curiae, the cases were heard beginning August 20, 1975, in a trial that lasted seven days. Because many facts were stipulated, the evidence at the trial consisted largely of expert testimony. The cases are now submitted on evidence offered at trial, depositions, exhibits, photographs, briefs and over 1,000 stipulated facts. The trial concluded with the admission by defendants' lead counsel, in open court, that the evidence conclusively established aggravated and existing violations of plaintiffs' Eighth Amendment rights.

The Alabama Board of Corrections (hereinafter the Board) is charged with the responsibility for managing the state's penal institutions.[4] The Board currently operates four large institutions for male inmates—Holman Unit Prison, G. K. Fountain Correctional Center, Draper Correctional Center, and Kilby Corrections Facility. Kilby also contains the hospital facility for all state prisoners and the classification center for male inmates. The Board also maintains Julia Tutwiler Prison for women and the Frank Lee Youth Center for young men.[5] Additionally, there are six road camps, one pre-release center, and eight work-release centers. Currently the inmate population of these institutions is in excess of 5,000.

The four principal institutions are horrendously overcrowded. At the time of the trial of these cases the prison population in these four institutions was as follows:

4. Ala.Code tit. 45, §§ 3, 10(1) (1958).

5. To be eligible for assignment to Frank Lee Youth Center an inmate must be no more than 23 years old, must have a sentence of less than 10 years, must not have been convicted of a crime involving violence, and must have no history of drug abuse.

	Maximum Number for Which Designed	Number in Custody
Fountain	632	Over 1100
Holman	540	Over 750
Draper	632	Over 1000
Kilby	503	Over 700

The overcrowded condition of these institutions is the subject of another class action, *McCray v. Sullivan*, 399 F.Supp. 271 (S.D.Ala.1975). Following the close of evidence in the instant cases, a joint interim order was entered by this Court and the *McCray* court, enjoining the defendants from accepting any new prisoners, except escapees and parole violators, into these four institutions until the population in each is reduced to design capacity.[6] The purpose of that emergency order was to prevent aggravation of the conditions created by the grave Eighth Amendment violations.

The effects of severe overcrowding are heightened by the dormitory living ar-
[323] **rangements which prevail in these institutions. Bunks often are packed together so closely that there is no walking space between them. Sanitation and se-**

6. Order of August 29, 1975.

curity are impossible to maintain. There was testimony that the quarantine population at Kilby[7] is so crowded that inmates have to sleep on mattresses spread on floors in hallways and next to urinals. As will be noted, overcrowding is primarily responsible for and exacerbates all the other ills of Alabama's penal system.

The dilapidation of the physical facilities contributes to extremely unsanitary living conditions. Testimony demonstrated that windows are broken and unscreened, creating a serious problem with mosquitoes and flies. Old and filthy cotton mattresses lead to the spread of contagious diseases and body lice. Nearly all inmates' living quarters are inadequately heated and ventilated. The electrical systems are totally inadequate, exposed wiring poses a constant danger to the inmates, and insufficient lighting results in eye strain and fatigue.

In general, Alabama's penal institutions are filthy. There was repeated tes-

7. Kilby is the receiving center for inmates being processed in and out of state prisons. New inmates are kept in quarantine for approximately six weeks. Kilby also maintains a permanent population of approximately 150.

timony at trial that they are overrun with roaches, flies, mosquitoes, and other vermin. A public health expert testified that he found roaches in all stages of development—a certain indicator of filthy conditions. This gross infestation is due in part to inadequate maintenance and housekeeping procedures, and in part to the physical structure of the buildings themselves. For example, floors in many shower rooms are so porous that it is impossible to keep them clean. Plumbing facilities are in an exceptional state of disrepair. In one area at Draper, housing well over 200 men, there is one functioning toilet. Many toilets will not flush and are overflowing. Some showers cannot be turned off and continually drip or even pour water. Frequently there is no hot running water for substantial periods of time. Witnesses repeatedly commented on the overpowering odor emanating from these facilities.

Personal hygiene is an insurmountable problem in these circumstances. The parties stipulated that the state supplies prisoners only with razor blades and soap. It was further stipulated that the state furnished no toothpaste, tooth-

brushes, shampoo, shaving cream, razors or combs; but that such items are available for those inmates who can afford them. Further, household cleaning supplies rarely are available for inmates to maintain their living areas.

Food service conditions are equally unsanitary. Food is improperly stored in dirty storage units, and is often infested with insects. Mechanical dishwashers are not adequately maintained and therefore do not even approach the minimum temperature required for proper sanitation. Moreover, food service personnel, many of whom are inmates, are often untrained and do not follow proper sanitation procedures in the handling and preparation of food. Inmates are not supplied with reasonable eating and drinking utensils; some inmates drink from used tin cans, and have to wash and save their own utensils from meal to meal. Garbage sits in large open drums throughout the dining halls. As a general rule, the food is unappetizing and unwholesome. Inmates with some source of funds may supplement their diets from the prison canteen, but the large majority must subsist only on what is supplied by the kitchen. One menu is

prepared for all inmates who require a special diet, regardless of whether it meets their particular needs.

One expert witness, a United States public health officer, toured facilities at Draper, Fountain, Holman, and Kilby. He testified at trial that he found these facilities wholly unfit for human habitation according to virtually every criteri-
[324] on used for evaluation by public health inspectors. With very few exceptions, his testimony was that, if such facilities were under his jurisdiction, he would recommend that they be closed and condemned as an imminent danger to the health of the individuals exposed to them. This Court credits this testimony and makes it a part of these findings.

There is no working classification system in the Alabama penal system, and the degree to which this impedes the attainment of any proper objectives of a penal system cannot be overstated. Although classification personnel throughout the state prisons have been attempting to implement a wholly new classification process established in January, 1975, understaffing and overcrowding have produced a total breakdown of that process. For no valid reason apparent

from the evidence, far too many inmates receive maximum security classifications under the present classification system. Moreover, during what is called the classification process, new inmates, who are already trying to adjust to the new environment of the prison, are restricted to the overcrowded living quarters and are permitted neither visitors nor recreation. Testing and evaluation of these individuals, essential to a working classification system, cannot be regarded as reliable or even useful when conducted under such traumatic and stressful conditions.

Prison officials do not dispute the evidence that most inmates are assigned to the various institutions, to particular dormitories, and to work assignments almost entirely on the basis of available space. Consequently, the appreciable percentage of inmates suffering from some mental disorder is unidentified, and the mentally disturbed are dispersed throughout the prison population without receiving treatment. This Court previously found in an Alabama prison system case that approximately 10 percent of the inmate population are psychotic, and that another 60 percent are

disturbed enough to require treatment.[8] The evidence in the instant cases clearly reflects that nothing has been done to alleviate this situation. Some of these inmates should, according to the undisputed evidence presented in these cases, be transferred to a facility for the criminally insane, and many others should be treated within the penal system. The evidence further reflects that there are also a number of mentally retarded inmates who need to be, according to any humanitarian concept, identified and placed in an appropriate environment. A 1972 study prepared by the University of Alabama Center for Correctional Psychology, under contract with the Board of Corrections, highlighted the woefully inadequate mental health program in Alabama prisons and suggested minimum standards. None of these recommended standards have been implemented. The findings and conclusions of that study are fully supported by the evidence in these cases.

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8. *Newman v. Alabama*, 349 F.Supp. 278 (M.D. Ala.1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975).

Further effects of failure to classify are manifold. Violent inmates are not isolated from those who are young, passive, or weak. Consequently, the latter inmates are repeatedly victimized by those who are stronger and more aggressive. Testimony shows that robbery, rape, extortion, theft and assault are everyday occurrences among the general inmate population. Rather than face this constant danger, some inmates voluntarily subject themselves to the inhuman conditions of prison isolation cells.

Emotional and physical disabilities which require special attention pass unnoticed. There is no rational basis on which to assign inmates to the few vocational, educational and work opportunities which do exist. All of this contributes to the apathy, tension and frustration which pervade Alabama prisons.

The inmate population also contains a number of aged and infirm who are often housed in dormitories in which conditions are particularly hazardous. There
[325] are no special programs to meet the needs of these people and they are frequently unprotected from the general population. For example, in Draper such prisoners—some of them confined

to wheelchairs, others scarcely able to move without help—are left without supervision in second-floor quarters that are accessible only by stairway, with no means of evacuation in the event of fire or other physical emergency, and utterly helpless in the event of the sort of medical emergency to which the elderly are susceptible. In this idleness, filth and despair, the condition of these inmates can be expected only to deteriorate further.

Each of these failings in Alabama's penal system is compounded by that system's most pervasive and most obvious problem: the overcrowding with which all prisoners must live. Yet even if the inmate population were reduced to design capacity, the system would still be woefully understaffed. Former Commissioner Sullivan testified that the four large institutions alone need, at a minimum, 692 guards, but that they currently employ only 383. Guards rarely enter the cell blocks and dormitories, especially at night when their presence is most needed. The extremely high inmate-to-staff ratio makes personal interaction between the two virtually impossible be-

cause staff members must spend all their time attempting to maintain control or to protect themselves.

Another result of understaffing is that some inmates have been allowed to assume positions of authority and control over other inmates, creating opportunities for blackmail, bribery, and extortion. Some prisoners are used as "strikers" to guard other inmates on farm duty and as "cell flunkies" to maintain order and perform tasks for prison staff. They are afforded special privileges, including freedom to ignore prison regulations and to abuse other inmates. Inmate clerks have access to the institutional files and mail of other inmates; inmate medical aides are used to dispense some medication, which they may withhold at will.

The problems posed by understaffing are aggravated by the fact that most of the large institutions are located in rural areas of the state. The guards, drawn largely from the local population, are practically all white and rural in contrast to the predominantly black and urban inmate population they supervise. A number of witnesses testified that staff members address black inmates with racial slurs, further straining already tense relations.

In view of the foregoing, the rampant violence and jungle atmosphere existing throughout Alabama's penal institutions are .no surprise. The evidence reflects that most prisoners carry some form of homemade or contraband weapon, which they consider to be necessary for self-protection. Shakedowns to remove weapons are neither sufficiently thorough nor frequent enough to significantly reduce the number of weapons. There are too few guards to prevent outbreaks of violence, or even to stop those which occur.

While it is clear that violence is widespread, there are no accurate statistics on the incidence of violence. A cardinal precept of the convict culture is that no inmate should report another inmate to officials. This reluctance to report violence is compounded by the failure of prison officials to keep accurate records of violence which does come to their attention.

One 20-year-old inmate, after relating that he has been told by medical experts that he has the mind of a five year old, testified that he was raped by a group of inmates on the first night he spent in an Alabama prison. On the second night he

was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.

An inmate required to live in these circumstances stands no chance of leaving the institution with a more positive and constructive attitude than the one he or she brought in. The evidence reflects that even if rehabilitation programs, adequate in number and quality,
[326] were available, whatever benefit might be derived from them could be undone quickly by this inhumane environment. Consequently, this Court finds that these conditions create an environment in which it is impossible for inmates to rehabilitate themselves—or to preserve skills and constructive attitudes already possessed—even for those who are inclined to do so. Further, this Court finds that these conditions create an environment that not only makes it impossible for inmates to rehabilitate themselves but also makes dehabilitation inevitable.

Inmates are denied any meaningful opportunity to participate in vocational, educational or work activities. As a result, most inmates must spend substan-

tially all of their time crowded in dormitories in absolute idleness. Such unbroken inactivity increases boredom, tension and frustration, which in turn promote incidents of violence. The evidence reflects that idleness of this magnitude destroys any job skills and work habits inmates may have, and contributes to their mental and physical degeneration.

An examination of the very few rehabilitative programs which do exist reveals that they are totally inadequate to provide reasonable opportunities for rehabilitation—or even to prevent physical and mental deterioration—of most of the inmate population. It was stipulated that the average reading level of prisoners entering the penal system in the first quarter of the year 1975 was below the sixth grade level. Yet basic education classes are available to only a small number of inmates. For example, Holman Prison, with more than 750 inmates, offers Adult Basic Education for only 40 inmates at any one time. At Kilby, an inmate conducts that institution's only basic education class.

While the Board of Corrections has made some recent efforts to increase vocational training and work opportunities,

those programs[9] are available to only a limited number of selected inmates. Eligibility requirements for most programs are quite restrictive.

In light of the stipulation that 59 percent of Alabama's state prisoners are unskilled—and that another 5.5 percent claim no occupation—it is clear that access to existing programs for these prisoners who need vocational training is minimal. For those few inmates who qualify, the range of occupations and trades offered is extremely limited.

The Board offers an acceptable rehabilitation opportunity to a limited number of inmates through one pre-release center and eight work-release centers. In addition to providing job skills, the programs allow prisoners to gradually re-enter the community and to save some money, up to 75 percent of their salaries, prior to release. Again, there are stringent eligibility requirements for the few openings in these programs.

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9. For example, for entry into many programs an inmate must have no disciplinary violations for six months prior to enrollment, must have no holdovers, must have a regular duty assignment, must not be considered a security risk, and must be within 18 months of his or her release date upon completion of the course.

The single exception to the dearth of rehabilitation programs is the Frank Lee Youth Center. However, that institution houses approximately 200 selected inmates who meet strict objective and subjective criteria.[10] Most inmates at Frank Lee can expect to participate in a number of educational, vocational and recreational activities. To date the inmate population at Frank Lee has been over 50 percent white in contrast to the predominantly black populations at other state penal institutions.

Institutional work assignments offer little to motivate inmates. There are too few jobs and most take only a few hours to perform. Frequently many more inmates are assigned to a particular job
[327] than are required to accomplish it. Prisoners work for no pay and at jobs which do not teach usable skills. Inmates at Fountain and Holman, most of whom intend to return to metropolitan areas upon release, are routinely assigned to farm labor. Fountain operates a license

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10. See note 5 *supra*. The Director of the Frank Lee Youth Center, William Gilmore, testified that he relied on his own subjective evaluation, as well as the criteria outlined in note 5, in selecting inmates.

tag plant, and Draper has a mattress factory. Neither of these programs is available to any significant number of inmates. Other inmates who have an assigned task perform housekeeping functions for the institution. As observed, the lack of meaningful work opportunities contributes to idleness, boredom, apathy and frustration.

The flow of money through Alabama prisons is for all practical purposes uncontrolled. Each prisoner receives 25 cents per week from the state, as well as postage and paper for one letter each week. There are almost no legitimate means for an inmate to earn money. Some prisoners receive substantial sums from outside sources and through contraband activities. Money is required to buy personal hygiene items, food to supplement the prison diet, and postage. Money can also buy drugs, alcohol, changes in institutional records, special privileges, sex, and housekeeping favors. Interest collected on loans made by inmates with money is exorbitant, and may be collected in a ruthless manner. Gambling, smuggling, and extortion are several of the abuses fueled by the failure of prison officials to control the pos-

session of currency inside the institution. Finally, many prisoners must make the difficult transition from prison life on the pittance the state provides them upon release.[11]

There is no organized recreation program for Alabama's prisons. While some athletic facilities and equipment are available, they are not properly maintained. Almost no provision is made for inmates to participate in hobbies. Consequently, inmates have little to occupy the inordinate amount of free time they must fill.

The chances of successful rehabilitation or the chances of escaping mental and physical degeneration are also diminished by the fact that prison environment is much different from that in the society to which an inmate must return.

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11. The state is required by statute to provide an inmate, upon release, with "a decent suit of clothes and with the least expensive mode of public transportation back to the point of sentencing . . . ." Ala.Code tit. 45 § 54 (Supp.1973). The state also provides ten dollars in cash to all inmates serving five years or less, and an additional two dollars per year for each additional year served. Ala.Code tit. 45 § 55 (1958).

Current visitation policies discourage visits—which are essential to the maintenance of community ties—and therefore decrease an inmate's chances of successful reintegration upon release. Some institutions allow visitors only on alternate Sundays, while inmates in quarantine at Kilby are permitted no visitors. Visiting areas are overcrowded and uncomfortable, allow no privacy, and prohibit physical contact in some instances. Public transportation to institutions located in remote areas of the state is infrequent and too expensive for many people to use regularly.

An oral order enjoining the use of isolation and segregation cells which do not meet minimum standards was issued by the Court at the conclusion of the trial in these cases. The indescribable conditions in the isolation cells required immediate action to protect inmates from any further torture by confinement in those cells. As many as six inmates were packed in four foot by eight foot cells with no beds, no lights, no running water, and a hole in the floor for a toilet which could only be flushed from the outside. The infamous Draper "doghouse" is a separate building, locked

from the outside, with no guard stationed inside. Inmates in punitive isolation received only one meal per day, frequently without utensils. They were permitted no exercise or reading material and could shower only every 11 days. Punitive isolation has been used to punish inmates for offenses ranging from
[328] swearing at guards and failing to report to work on time, to murder.

[2, 3] In light of the foregoing facts, this Court has a clear duty to require the defendants in these cases to remedy the massive constitutional infirmities which plague Alabama's prisons. It is with great reluctance that federal courts intervene in the day-to-day operation of state penal systems, *Procunier v. Martinez,* 416 U.S. 396, 404–05, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); *Cruz v. Beto,* 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Novak v. Beto,* 453 F.2d 661, 671 (5th Cir. 1971); *Diamond v. Thompson,* 364 F.Supp. 659, 662 (M.D.Ala.1973), a function they are increasingly required to perform.[12] While this Court continues

12. Federal courts in a number of states including Massachusetts, *Inmates of Suffolk County Jail v. Eisenstadt,* 360 F.Supp. 676 (D.Mass. [footnote continued]

to recognize the broad discretion required for prison officials to maintain orderly and secure institutions, *Procunier v. Martinez,* 416 U.S. at 404–05, 94 S.Ct. 1800; *Diamond v. Thompson,* 364 F.Supp. 659 (M.D.Ala.1973); *Newman v. Alabama,* 349 F.Supp. 278 (M.D.Ala. 1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), constitutional deprivations of the magnitude

1973), *aff'd* 494 F.2d 1196 (1st Cir. 1974); Maryland, *Collins v. Schoonfield,* 344 F.Supp. 257 (D.Md.1972); Arkansas, *Holt v. Sarver,* 309 F.Supp. 362 (E.D.Ark.1970), *aff'd* 442 F.2d 304 (8th Cir. 1971); and Mississippi, *Gates v. Collier,* 349 F.Supp. 881 (N.D.Miss.1972), *aff'd* 501 F.2d 1291 (5th Cir. 1974), recently have had occasion to hold conditions in penal institutions in those states unconstitutional. In Alabama, this Court in previous cases has addressed the issues of inadequate medical care, *Newman v. Alabama,* 349 F.Supp. 278 (M.D. Ala.1972), *aff'd in part* 503 F.2d 1320 (5th Cir. 1974), *cert. denied* 421 U.S. 948, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975); and disciplinary procedures, *Diamond v. Thompson,* 364 F.Supp. 659 (M.D.Ala.1973), in the state's prisons. Federal courts in other districts of this state have found unconstitutional conditions in both state, *McCray v. Sullivan,* 399 F.Supp. 271 (S.D.Ala.1975), and local, *Thrasher v. Bailey,* CA 73P 816–S (N.D.Ala. Aug. 29, 1973), penal facilities.

presented here simply cannot be countenanced, and this Court is under a duty to, and will, intervene to protect incarcerated citizens from such wholesale infringements of their constitutional rights. See *Procunier v. Martinez,* 416 U.S. at 405–06, 94 S.Ct. 1800; *Johnson v. Avery,* 393 U.S. 483, 486, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

[4–7] Federal litigation by prisoners alleging systemic constitutional deficiencies has mushroomed in recent years. There has been growing recognition by the courts that prisoners retain all rights enjoyed by free citizens except those necessarily lost as an incident of confinement. See *Pell v. Procunier,* 417 U.S. 817, 822, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1973); *Jackson v. Godwin,* 400 F.2d 529, 532 (5th Cir. 1968); *Washington v. Lee,* 263 F.Supp. 327, 331 (M.D.Ala.1966), *aff'd per curiam,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968); *cf. Price v. Johnston,* 334 U.S. 266, 285, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948); *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974). The Supreme Court recently identified three legitimate functions of a correctional system: deterrence, both specific and

general; rehabilitation; and institutional security. *Pell v. Procunier,* 417 U.S. at 822–23, 94 S.Ct. 2800. "It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners." *Id.* at 823, 94 S.Ct. at 2804. Therefore, when a prison policy advances one of these valid goals, the Court is required to weigh the competing interests of the prisoner and of the state in pursuing that goal. When an inmate is restricted in a manner which supports no such valid purpose, that restriction cannot stand.

[8–10] Prisoners are entitled to be free of conditions which constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The content of the Eighth Amendment is not static but "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d
[329] 630 (1958). There can be no question that the present conditions of confinement in the Alabama penal system violate any current judicial definition of cruel and unusual punishment, a situa-

tion evidenced by the defendants' admission that serious Eighth Amendment violations exist.[13] In these circumstances, it is the very confinement itself which impermissibly contravenes the Eighth and Fourteenth Amendment rights of the plaintiff classes.

> [C]onfinement itself within a given institution may amount to a cruel and unusual punishment prohibited by the Constitution where the confinement is characterized by conditions and practices so bad as to be shocking to the conscience of reasonably civilized people even though a particular inmate may never personally be subject to any disciplinary action.

Holt v. Sarver, 309 F.Supp. 362, 372–73 (E.D.Ark.1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

The conditions in which Alabama prisoners must live, as established by the evidence in these cases, bear no reasonable relationship to legitimate institution-

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13. Defendants through their lead counsel, the Honorable Robert S. Lamar, Jr., admitted in open court, at the close of trial, that plaintiffs had proved serious Eighth Amendment violations.

al goals. As a whole they create an atmosphere in which inmates are compelled to live in constant fear of violence, in imminent danger to their physical well-being, and without opportunity to seek a more promising future.

[11] The living conditions in Alabama prisons constitute cruel and unusual punishment. Specifically, lack of sanitation throughout the institutions—in living areas, infirmaries, and food service—presents an imminent danger to the health of each and every inmate. Prisoners suffer from further physical deterioration because there are no opportunities for exercise and recreation. Treatment for prisoners with physical or emotional problems is totally inadequate. This Court has previously ordered that the penal system provide reasonable medical care for inmates in these institutions on a finding that

> [f]ailure of the Board of Corrections to provide sufficient medical facilities and staff to afford inmates basic elements of adequate medical care constitutes a willful and intentional violation of the rights of prisoners guaranteed under the Eighth and Fourteenth Amendments.

Newman v. Alabama, 349 F.Supp. at 285–86. The evidence in these cases leads to the inescapable conclusion that the gross inadequacies in medical care found in that case have not been remedied.

[12] Prison officials are under a duty to provide inmates reasonable protection from constant threat of violence.

> While occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, *Penn v. Oliver*, 351 F.Supp. 1292 (E.D. Va.1972), confinement in a prison where violence and terror reign is actionable. A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief.

Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (4th Cir. 1973); see *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 201 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1308–09 (5th Cir. 1974); *Holt v. Sarver*, 309 F.Supp. 362, 376–78, 381 (E.D.Ark. 1970), *aff'd* 442 F.2d 304 (8th Cir. 1971).

[13] The defendants in these cases have failed to carry out that duty. The evidence establishes that inmates are housed in virtually unguarded, overcrowded dormitories, with no realistic attempt by officials to separate violent, aggressive inmates from those who are passive or weak. The tension generated
[330] by idleness and deplorable living conditions contributes further to the ever-present threat of violence from which inmates have no refuge.

[14] The evidence in these cases also establishes that prison conditions are so debilitating that they necessarily deprive inmates of any opportunity to rehabilitate themselves, or even to maintain skills already possessed. While courts have thus far declined to elevate a positive rehabilitation program to the level of a constitutional right, it is clear that a penal system cannot be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration.

> The absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a pro-

gram conditions and practices exist which actually militate against reform and rehabilitation.

Holt v. Sarver, 309 F.Supp. at 379.

[15] Not only is it cruel and unusual punishment to confine a person in an institution under circumstances which increase the likelihood of future confinement, but these same conditions defeat the goal of rehabilitation which prison officials have set for their institutions. See *James v. Wallace*, 382 F.Supp. 1177, 1180 n.4 (M.D.Ala.1974).

[16–18] Prisoners are protected by the Due Process and Equal Protection clauses of the Fourteenth Amendment, *Washington v. Lee*, *supra*; therefore, they must be free from arbitrary and capricious treatment by prison officials. *Sostre v. McGinnis*, 442 F.2d 178, 198–99 (2d Cir. 1971) (en banc), *cert. denied sub nom. Sostre v. Oswald*, 404 U.S. 1049, 92 S.Ct. 719, 30 L.Ed.2d 740 and *sub nom. Oswald v. Sostre*, 405 U.S. 978, 92 S.Ct. 1190, 31 L.Ed.2d 254 (1971); *Jackson v. Godwin*, 400 F.2d 529, 532 (5th Cir. 1968). There is evidence in these cases that the Alabama penal system makes available a very limited number of vocational, educational, and work opportunities. Open-

ings in whatever programs are offered must be assigned on a reasonable and rational basis. See *Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973). Currently, inmates are able to buy and sell desirable jobs. Moreover, while the prison system is entitled to make rational distinctions in making assignments, it is impossible to do so without a functioning classification system.

[19, 20] The inmates' ability to engage in rehabilitation is further frustrated by unreasonable restrictions on visitation from family and friends. Any restrictions imposed by the prisons' visitation policies must be reasonably related to a legitimate governmental interest. See *Thompson v. Gallagher*, *supra*. The visitation policies currently employed by Alabama penal institutions do not serve the valid penal objectives defined by the Supreme Court in *Pell v. Procunier*, 417 U.S. at 822–23, 94 S.Ct. 2800.

[21] The response of the defendants to the matters set forth in this opinion consistently has been that they cannot alleviate the conditions because of inadequate funding by the state legislature. However, a state is not at liberty to

afford its citizens only those constitutional rights which fit comfortably within its budget. The Alabama Legislature has had ample opportunity to make provision for the state to meet its constitutional responsibilities in this area, and it has failed to do so. It is established beyond doubt that inadequate funding is no answer to the existence of unconstitutional conditions in state penal institutions.

> Let there be no mistake in the matter; the obligation of the Respondents to eliminate existing unconstitutionalities does not depend upon what the Legislature may do, or upon what the Governor may do, or, indeed, upon what Respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States.

[331] *Holt v. Sarver*, 309 F.Supp. at 385. See *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 201 (8th Cir. 1974); *Gates v. Collier*, 501 F.2d 1291, 1319–20 (5th Cir. 1974).

[22–25] In *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214

(1975), the Supreme Court held that, under Section 1983, plaintiffs can recover money damages from state officials if the officials acted either in bad faith or in "disregard of settled, indisputable law." *Id.* at 321, 95 S.Ct. 992. To put it another way: a public official may be held liable where he, in subjective good faith, acts in disregard of a person's "clearly established constitutional rights." *Id.* at 322, 95 S.Ct. 992. The Court now acts in these cases with a recognition that prisoners are not to be coddled, and prisons are not to be operated as hotels or country clubs. However, this does not mean that responsible state officials, including the Alabama Legislature, can be allowed to operate prison facilities that are barbaric and inhumane. Let the defendant state officials now be placed on notice that failure to comply with the minimum standards set forth in the order of this Court filed with this opinion will necessitate the closing of those several prison facilities herein found to be unfit for human confinement.

The costs of these proceedings will be taxed against the defendants.

An order will be entered accordingly.

ORDER

Pursuant to the findings of fact and conclusions of law set forth in the memorandum opinion made and entered in this cause this date, it is the order, judgment and decree of this Court that:

1. Defendants, George C. Wallace, individually and in his official capacity as Governor of Alabama; The State of Alabama; The Alabama Board of Corrections; Judson C. Locke, Jr., individually and in his official capacity as Commissioner of the Alabama Board of Corrections; L. B. Sullivan, individually and in his capacity as Deputy Commissioner of the Alabama Board of Corrections; Bill Long, individually and in his official capacity as Warden of Kilby Corrections Facility; J. O. Davis, individually and as Warden of G. K. Fountain Correctional Center; M. B. Harding, individually; H. Crouch, individually; Yetta G. Samford, Jr., individually; Dr. Max V. McLaughlin, individually; and Reverend John E. Vickers, Dr. Thomas F. Staton, Dr. Marion L. Carroll, Jr., and Mr. Thomas E.

Bradford, Sr., individually and as members of the Board of Corrections of the State of Alabama, their agents, employees, successors in office and any others acting in concert with them, be and each is hereby enjoined from failing to implement fully and within the times prescribed each of the requirements set forth in Appendix A to this decree.

2. A Human Rights Committee for the Alabama Prison System be and is hereby designated and appointed. The members of that Committee are listed in Appendix B attached hereto and incorporated herein. The members of the Committee shall be paid on a per diem basis and shall be reimbursed for travel and other expenses necessarily incurred at the same rate and in the same manner as members of the Alabama Board of Corrections. The function of the Human Rights Committee, acting as a Committee as a whole or through standing subcommittees appointed by the Committee chairman, shall be to monitor implementation of the standards set forth in Appendix A to this decree. In view of this Court's finding that the standards established in *Newman v. Alabama*, 349 F.Supp. 278, *aff'd in part* 503 F.2d 1320

(5th Cir. 1974), *cert. denied* 421 U.S. 928, 95 S.Ct. 1680, 44 L.Ed.2d 102 (1975), have not been implemented, the Human Rights Committee shall also have the authority and duty to monitor implementation of the requirements of that order. The Committee may at reasonable times inspect the state prison facilities, interview inmates, and inspect institutional records. The Committee shall review plans for implementation of this decree to ensure that they comport with the minimum standards set forth. At its
[332] discretion, the Committee may engage and consult appropriate, independent specialists who shall be compensated by the Board of Corrections. The Committee shall be authorized to take any action reasonably necessary to accomplish its function. The Committee is also hereby authorized and empowered to employ upon a full time basis a staff consultant, trained and experienced in the operation of state prison systems, answerable only to the Human Rights Committee; said full time consultant shall be paid upon a basis and at a rate commensurate with the remuneration being received by the Commissioner of the Alabama Board of Corrections. The Committee is further authorized and em-

powered to employ [to be paid by the defendant Board] one full time clerk-stenographer, responsible only to the Committee. Adequate physical facilities and equipment and supplies will be made available to the consultant and to the clerk by the Alabama Board of Corrections.

3. The defendants, within six months from this date, shall submit to this Court a comprehensive report setting forth their progress in the implementation of each and every standard. The report shall set forth reasons for the incomplete implementation of any standard. The report shall also include a time-table for full compliance.

4. The court costs incurred in these proceedings be and are hereby taxed against the defendants. The defendants are ordered to pay to the Clerk of this Court within 30 days the court costs, as set forth on the costs bills of plaintiffs' attorneys.

5. Jurisdiction of these cases be and is hereby specifically retained.

APPENDIX A

MINIMUM CONSTITUTIONAL STANDARDS FOR INMATES OF ALABAMA PENAL SYSTEM

I. *Overcrowding*

1. The number of inmates in each institution in the Alabama penal system shall not exceed the design capacity for that institution. No new prisoners, except escapees and parole violators who have had their paroles revoked, may be accepted until the inmate population is no greater than the design capacity for each facility.

II. *Segregation and Isolation*

1. No more than one prisoner shall be confined in a single cell, and each such cell shall be a minimum of 40 square feet. Within six months, the area of each single occupancy isolation cell shall be no less than 60 square feet.

2. Each cell shall be equipped with a toilet which can be flushed from the inside, a sink with hot and cold running water, ventilation and lighting which

meet minimum standards of the United States Public Health Service, clean linen, and a bed off the floor.

3. Each inmate confined in isolation shall be

(a) permitted to bathe at least every other day;

(b) provided three wholesome and nutritious meals per day, served with eating and drinking utensils;

(c) supplied the same toilet articles and linens as are required to be provided to the general inmate population;

(d) provided reading and writing materials, and allowed any personal legal papers or research materials;

(e) allowed at least 30 minutes outdoor exercise per day; and

(f) afforded adequate medical and mental health care, including examination by a physician and a qualified mental health care professional at least every third day. No inmate shall be deprived of physical aids or prosthetic devices.

4. Confinement in isolation shall be imposed as punishment only after compliance with the requirements of due

process as set forth in *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Any period of con-
[333] finement for the purpose of punishment shall not exceed 21 days.

5. Any prisoner who is voluntarily segregated must be released immediately upon request.

6. The confinement of any prisoner in administrative segregation must be reviewed at least every seven days, and the prisoner must be released from segregation unless such review determines that there is good cause for continued segregation.

III. *Classification*

1. By April 15, 1976, the defendants shall file with the Court a plan for the classification of all inmates incarcerated in the Alabama penal system. The Board of Corrections shall contract with the University of Alabama Department of Correctional Psychology to aid in the implementation of that plan. The classification shall be fully completed no later than August 16, 1976.

2. The plan to be submitted to the Court shall include:

(a) due consideration to the age; offense; prior criminal record; vocational, educational and work needs; and physical and mental health care requirements of each inmate;

(b) methods of identifying aged, infirm, and psychologically disturbed or mentally retarded inmates who require transfer to a more appropriate facility, or who require special treatment within the institution; and

(c) methods of identifying those inmates for whom transfer to a pre-release, work-release, or other community-based facility would be appropriate.

3. The classification of each inmate shall be reviewed at least annually.

IV. *Mental Health Care*

1. The defendants shall identify those inmates who, by reason of psychological disturbance or mental retardation, require care in facilities designed for such persons, and arrangements shall be made for the transfer of such inmates.

2. The defendants shall identify those inmates who require mental health care

within the institution and make arrangements for the provision of such care.

3. The defendants shall hire at least those mental health professionals and support personnel as set forth in *Minimum Mental Health Standards for the Alabama Correctional System.* (Center for Correctional Psychology, University of Alabama, December 1972).

V. *Protection from Violence*

1. The defendants shall make reasonable efforts, including classification and monitoring, to segregate inmates known to engage in violence and aggression.

2. Only minimum custody inmates may be assigned to dormitories.

3. The defendants shall establish regular procedures, including frequent shakedowns and frisks of inmates returning to the institutions, to reduce the number of weapons held by inmates.

4. Defendants shall enforce prison regulations designed to reduce violence, including rules against fighting, possession of weapons, gambling, or possession of currency within the institutions. Inmates, except those in pre-release and work-release type programs, shall not possess currency. Defendants shall institute a scrip system for approved intra-institutional purchases by inmates.

5. With the exception of isolation units, guards shall be stationed inside living areas, including dormitories, at all times. There shall be at least one guard inside, and one guard outside, all living areas at all times. As to isolation units, guards must be stationed at all times so as to have visual and voice contact with the isolated prisoners.

6. At no time shall prisoners be used to guard other prisoners, nor shall prisoners be placed in positions of authority over other inmates.

7. The defendants shall keep accurate records of incidents of violence which come to their attention, and all assaults
[334] and other offenses punishable under the laws of Alabama shall be reported forthwith to the local district attorney. Accurate records shall be kept reflecting the disposition of such incidents by prison authorities and any resultant criminal prosecutions undertaken.

VI. *Living Conditions*

1. Prisoners shall be supplied, without charge, toothbrushes, toothpaste,

shaving cream, razors and razor blades, soap, shampoo, and combs. Each prisoner also shall be provided adequate clean clothing and a storage locker with a lock.

2. Each prisoner shall be supplied weekly with clean bed linen and towels.

3. Each inmate shall have access to household cleaning supplies in order to maintain living areas, and sanitary conditions within the institutions shall meet minimum public health standards. The defendants shall be responsible for implementing a regular and effective program of insect and rodent control.

4. All institutions shall be adequately heated, lighted and ventilated. Windows and doors shall be properly screened and otherwise properly maintained. Electrical wiring must be safe.

5. Each prisoner shall have a bed off the floor, a clean mattress, and blankets as needed.

6. Each institution shall maintain in working order one toilet per 15 inmates, one urinal or one foot of urinal trough per 15 inmates, one shower per 20 inmates, and one lavatory per 10 inmates.

7. Each inmate shall have a minimum of 60 square feet of living space.

VII. *Food Service*

1. Every prisoner is entitled to three wholesome and nutritious meals per day, served with proper eating and drinking utensils.

2. The food served to inmates shall be nutritionally adequate and properly prepared under the direction of a food service supervisor for each institution; each supervisor shall have at least bachelor's level training in dietetics or its equivalent. The defendants shall employ a nutrition consultant for the Board of Corrections, who shall be a registered dietitian, to assist in menu planning, methods of food preparation, purchasing standards, and sanitation.

3. Food shall be stored, prepared and served under sanitary conditions which meet minimum public health standards. Equipment shall be maintained in good working condition. All kitchen employees shall be trained in the handling of food and those who assist in the preparation of food shall receive training in food preparation. Regulations relating to food service will be rigorously enforced.

4. Each inmate who requires a special diet for reasons of health or religion shall be provided a diet to meet his or her individual need.

VIII. *Correspondence and Visitation*

1. Defendants shall not limit the number or length of letters a prisoner may send or receive. Mail to or from courts, attorneys or other public officials shall be inspected only for contraband, and only in the presence of the prisoner to whom it is addressed or by whom it is mailed. Inspection or censorship of other mail must be in accordance with the standards set forth in *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1973). The defendants shall supply postage and paper for up to five letters per week for each inmate.

2. Each institution shall provide a comfortable, sheltered area for visitation. The visiting area must not, except for security purposes that have been documented, physically separate visitors from inmates. Visitation policies must permit an inmate to receive visitors on at least a weekly basis, and rules governing visitation must allow reasonable time and space for each visit. Visitors shall

not be subjected to any unreasonable searches. Inmates undergoing initial classification shall not be denied visitation privileges.

[335] IX. *Educational, Vocational, Work and Recreational Opportunities*

1. Each inmate shall be assigned a meaningful job on the basis of the inmate's abilities and interests, and according to institutional needs. Inmates shall not be required or allowed to perform household or personal tasks for any person.

2. Each inmate shall have the opportunity to participate in basic educational programs.

3. Each inmate shall have the opportunity to participate in a vocational training program designed to teach a marketable skill.

4. The defendants may establish reasonable entrance requirements and rational objective criteria for selecting inmates to participate in particular programs. However, no inmate shall be denied educational, vocational and work opportunities except while in isolation for disciplinary reasons or when the par-

ticipation of an inmate in a particular program presents a clear threat to institutional security.

5. Every inmate, prior to release, shall be afforded the opportunity to participate in some transitional program designed to aid in his or her re-entry into society.

6. Each institution shall employ a qualified full-time recreation director with at least bachelor's level training, or its equivalent, in recreation or physical education. Adequate equipment and facilities shall be provided to offer recreational opportunities to every inmate. Space shall be available for inmates to engage in hobbies. Suitable vocational programs shall be provided.

X. *Physical Facilities*

1. Defendants shall ensure that the physical plant of each facility in the Alabama penal system meets all of the minimum standards of the United States Public Health Service.

(a) Physical facilities in Draper Correctional Center shall meet minimum standards by December 15, 1976. A report setting forth

progress in the implementation of this requirement shall be filed 60 days before that date.

(b) Physical facilities in G. K. Fountain Correctional Center shall meet minimum standards by December 15, 1976. A report setting forth progress in the implementation of this requirement shall be filed 60 days before that date.

(c) Physical facilities in Holman Unit Prison shall meet minimum standards by December 15, 1977. A report setting forth progress in the implementation of this requirement shall be filed six months before that date.

(d) Physical facilities in Kilby Corrections Facility shall meet minimum standards by December 15, 1977. A report setting forth progress in the implementation of this requirement shall be filed six months before that date.

2. The defendants shall establish work-release, pre-release, and other community-based facilities to house inmates identified as appropriate for participation in such programs.

XI. *Staff*

1. Qualified staff sufficient to maintain institutional order and to administer programs shall be employed by the defendants, including a total custodial staff at each institution of no less than

Draper	184
Kilby	171
Fountain	178
Holman	159

2. Defendants shall provide appropriate and effective training programs for all staff members employed within the Alabama penal system.

3. Defendants shall immediately institute an affirmative hiring program designed to reduce and having the effect of reducing the racial and cultural disparity between the staff and the inmate population.

[336]

APPENDIX B

MEMBERSHIP OF THE HUMAN RIGHTS COMMITTEE FOR THE ALABAMA PRISON SYSTEM

1. Mr. M. R. Nachman, Jr.—Chairman—
   —P.O. Box 668
   Montgomery, Alabama 36101

2. Mr. Oscar W. Adams, Jr.
   2121 Building
   Birmingham, Alabama 35203

3. Dr. Mary Catherine Beasley
   14 Park Wood
   Tuscaloosa, Alabama 35401

4. Dr. Wiley R. Boyles
   3243 Fernway Drive
   Montgomery, Alabama 36111

5. Dr. Fred Campbell
   1722 Pine Street
   Montgomery, Alabama 36106

6. Dr. John Murphy Chenault
   1115 Somerville Road
   Decatur, Alabama 35610

7. Dr. Nace R. Cohen

750 Washington Avenue
Montgomery, Alabama 36104

8. Mr. Lee P. Dodd

Double Springs, Alabama 35553

9. Mr. William Fasin

1563 Oakland Street
Montgomery, Alabama 36108

10. Gen. E. M. Friend, Jr.

2030 1st Avenue, North
Birmingham, Alabama 35203

11. Mrs. Emily B. Gassenheimer

312 Scott Street
Montgomery, Alabama 36104

12. Dr. Lewis Jones

310 Bulls Street
Tuskegee, Alabama 36083

13. Dr. Moses W. Jones

244 Monroe Street
Montgomery, Alabama 36104

14. Dr. J. J. Kirschenfeld

2119 E. South Boulevard
Montgomery, Alabama 36111

15. Mr. Atley A. Kitchings, Jr.

600 19th Street, North
Birmingham, Alabama 35203

16. Mr. John L. LeFlore

1504 Chataque Avenue
Mobile, Alabama 36603

17. Mr. James L. Lovvorn

443 Wright's Mill Road
Auburn, Alabama 36830

18. Mr. John C. McCluney

3617 Southview Avenue
Montgomery, Alabama 36111

19. Mr. H. D. McInish

P.O. Box 1665
Dothan, Alabama 36301

20. Mrs. Laurie W. Mandell

Route 4, Box 168
Montgomery, Alabama 36111

21. Col. Floyd T. Mann

P.O. Box 295
Lanett, Alabama 36863

22. Dr. Julius Michaelson

P.O. Box 910
Foley, Alabama 36535

[337] 23. Dr. Alberta Murphy

13 Hillcrest Drive
Tuscaloosa, Alabama 35401

24. Mr. James Murry

101–A Chambless Building
Tuskegee Institute, Alabama 36088

25. Mrs. Fannie Allen Neal

2662 Rutland Street
Montgomery, Alabama 36108

26. Mrs. Otis Owens

33 Parkside
Tuscaloosa, Alabama 35401

27. Dr. Julius Pryor, Jr.

1156 Oak Street
Montgomery, Alabama 36104

28. Dr. Janet Robbins

Route 2, Box 204–A
Ramer, Alabama 36069

29. Dr. Paul I. Robinson

3303 Royal Carriage Drive
Montgomery, Alabama 36111

30. Mr. Solomon S. Seay, Jr.

352 Dexter Avenue
Montgomery, Alabama 36104

31. Mrs. Edward M. Selfe

3542 Lennox Road, South
Birmingham, Alabama 35213

32. Mrs. Mary Jo Smiley

4601 Lawnwood Drive
Montgomery, Alabama 36108

33. Mrs. Betty Stokes

801 Montgomery Road
Tuskegee Institute, Alabama 36088

34. Mr. Thomas W. Thagard, Jr.

600 Bell Building
Montgomery, Alabama 36104

35. Ms. Sue Thompson

2618 Eighth Street
Tuscaloosa, Alabama 35401

36. Mr. Barney Weeks

231 West Valley Avenue
Birmingham, Alabama 35209

37. Rev. Dan C. Whitsett

2122 Mona Lisa Drive
Montgomery, Alabama 36111

38. Mrs. Roscoe A. Williams

621 Alabama Street
Montgomery, Alabama 36104

39. Rev. Robert W. Wingard

3151 Woodfern Drive
Montgomery, Alabama 36111

APPENDIX F

IN THE

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed MAR 5, 1976]

CIVIL ACTION NO. 3501-N

N.H. NEWMAN, AND OTHERS,

Plaintiffs,

v.

STATE OF ALABAMA; et al.,

Defendants,

UNITED STATES OF AMERICA,

Amicus Curiae.

CIVIL ACTION NO. 74-57-N

JERRY LEE PUGH, for himself and all others similarly situated,

Plaintiffs,

v.

JUDSON C. LOCKE, JR., individually and in his official capacity as Commissioner of the Alabama Board of Corrections; et al.,

Defendants,

WILCOX COUNTY COMMISSION, as the governing body of the County of Wilcox, State of Alabama, and all other counties similarly situated; et al.,

Intervening Ancillary Plaintiffs,

v.

MELBA TILL ALLEN, individually and as State Treasurer, State of Alabama; et al.,

Ancillary Defendants,

IRA DE MENT, United States Attorney,

Amicus Curiae.

CIVIL ACTION NO. 74-203-N

WORLEY JAMES; et al.,

Plaintiffs,

v.

GEORGE C. WALLACE, individually and in his official capacity as Governor of Alabama; et al.,

Defendants,

WILCOX COUNTY COMMISSION, as the governing body of the County of Wilcox, State of Alabama, and all other counties similarly situated; et al.,

Intervening Ancillary Plaintiffs,

v.

MELBA TILL ALLEN, individually and as State Treasurer, State of Alabama; et al.,

Ancillary Defendants,

THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.; and IRA DE MENT, United States Attorney,

Amici Curiae.

MEMORANDUM OPINION

This cause is now submitted upon the motion for rehearing and modification filed by defendants on February 23, 1976. This motion was substituted by the defendants for their motion for a new trial filed January 23, 1976. This Court has previously entered an order concerning Paragraph B of defendants' motion, which requests a rehearing in these cases. The order previously entered required defendants to specify with particularity the errors of law to which this part of their motion refers. On March 1, 1976, defendants filed their specification of errors of law.

Paragraph A of defendants' motion submits ten specific requests for modification of this Court's order of January 13, 1976, that will be discussed seriatim.

The first ground in support of defendants' motion seeks modification of Paragraph III §1 of the order of this Court which presently requires the defendants to "contract with the University of Alabama Department of Correctional Psychology to aid in the implementation of [the classification plan to be filed with the Court by April 15, 1976]." That portion of the order is based in part on the testimony of Dr. Carl B. Clements, staff member and former acting director of the Department of Correctional Psychology, that the

Department has the ability and resources to aid the defendants with the plan. However, the defendants should be afforded the opportunity to select the assistance of any comparably qualified and willing agency or experts. If defendants do find a comparably qualified and willing agency or experts, defendants should submit to the Court the name of the agency and data evidencing its ability. That part of Paragraph III §1 of the order will be modified accordingly.

The second modification requested by the defendants concerns Paragraph IV §3 of the order which requires the hiring of "at least those mental health professionals and support personnel as set forth in *Minimum Mental Health Standards for the Alabama Correctional System* (Center for Correctional Psychology, University of Alabama, December, 1972)." It should be noted that the study admitted in evidence in these cases, was carried out under contract from the defendant Board of Corrections. However, the evidence in these cases established that the defendants have failed to implement even those mental health standards set forth four years ago in the case of *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), which was affirmed by the Court of Appeals, 503 F.2d 1320 (5th Cir. 1974). The defendant Board of Corrections proposed minimum mental health personnel standards pursuant to an order in that case. See Report of Defendants, January 4, 1973, Exhibit 9. Consequently, the order herein will be modified to require the defendants to meet the standards for hiring mental health personnel contained in their own report to the Court filed in *Newman v. Alabama* on January 4, 1973.

Third, defendants seek modification of Paragraph II of the order, setting forth minimum standards for

isolation and segregation. That paragraph will be modified to reflect the distinct functions served by isolation for punishment and by administrative segregation. Inmates who are duly confined in isolation according to the standards set forth in *Wolff v. McDonnell*, 418 U.S. 579 (1974), may face deprivations which may not be imposed on inmates who are administratively segregated. Courts have recognized, however, that inmates in punitive isolation may "not be deprived of basic necessities including light, heat, ventilation, sanitation, clothing and a proper diet." *Finney v. Arkansas Board of Corrections*, 505 F.2d 194, 208 (8th Cir. 1974); *see Berch v. Stahl*, 373 F. Supp. 412 (W.D.N.C. 1974). Consequently, Paragraph II of the order will be modified to allow prison officials the option of imposing additional sanctions against inmates who are in punitive isolation. An inmate in punitive isolation may be provided fewer than three meals per day provided that the inmate's total diet, while he is so confined, is not nutritionally inadequate. Required plumbing facilities may be omitted from a few punitive isolation cells for the confinement of inmates in punitive isolation who consistently misuse such facilities. However, those cells must contain at least a toilet which can be flushed from the outside, and such cells must be closely supervised by correctional personnel. Reading matter other than legal materials may be withheld for the period of punitive isolation. Finally, this Court declines to decrease the minimum cell space required by Paragraph II §1 as requested by defendants in paragraph A(8) of their motion. However, defendants may upon an appropriate request be granted an extension of time in which to bring existing isolation cells up to the minimum 60 square foot requirement.

Fourth, defendants petition for modification of the requirement in Paragraph II §5 that "[a]ny prisoner who is voluntarily segregated must be released immediately upon request." This requirement applies only to those inmates who are segregated by their own request, and not to inmates who are segregated by responsible officials for punitive or administrative reasons. The requirement in no way interferes with the discretion of prison officials in imposing segregation. Consequently, this request for modification will be denied.

The fifth ground advanced by defendants in support of their motion is a request for modification of the standard contained in Paragraph VII §4 under which "[e]ach inmate who requires a special diet for reasons of . . . religion shall be provided a diet to meet his or her individual needs." The Court does not intend for that standard to be manipulated as a means of obtaining special treatment or privileges. Further, the Court recognizes that the obligation to provide a special diet on religious grounds is due only to conscientious adherents to a bona fide religion. That portion of the order should be construed to allow the Board of Corrections to establish a procedure for reviewing requests for special diets on religious grounds. No modification to allow the establishment of such procedures is appropriate.

The sixth modification sought by defendants concerns Paragraph IX §1 which provides that "[i]nmates shall not be required or allowed to perform household or personal tasks for any person." There was repeated testimony presented upon the trial of these cases that prison officials, and even other inmates, used prisoners to perform personal and household tasks. These

personal services are performed without pay, and for no apparent vocational, educational or therapeutic purpose. Clearly, inmates may be required to perform household tasks within the institution; and the vocational, educational, and work programs established by the defendants may include household labor under appropriate circumstances. Appropriate circumstances for the requiring of inmates to perform household labor, maintenance work and other personal services will include the performance of such tasks at state owned and operated facilities and for state governmental officials who may be physically disabled and need personal services in order to perform their official functions. That part of the Court order will be modified accordingly.

Seventh, defendants object to Paragraph VIII §1 which requires that the defendants supply "postage and paper for up to five letters per week for each inmate." Under the conditions reflected by the evidence in these cases, it is incumbent on the defendants to provide inmates with some means to exercise their right to access to the courts, and to provide them with reasonable methods of communication with society outside the institution.

It is clear that prisoners have a right guaranteed by the First and Sixth Amendments of access to courts, public officials, and lawyers in order to present grievances and seek legal redress. *Johnson v. Avery,* 393 U.S. 483 (1969); *Barlow v. Amiss,* 477 F.2d 897 (5th Cir. 1973); *Frye v. Henderson,* 474 F.2d 1263 (5th Cir. 1973). "All other rights are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden." *Adams v. Carlson,* 488 F.2d 619 (7th Cir. 1973) *quoting Stiltner v. Rhay,* 322 F.2d 314 (9th Cir. 1963).

The Alabama prison system does not provide inmates with money or with any means of earning money with which to buy postage. Consequently, the defendants must provide some appropriate method for inmates to exercise their rights of access.

Moreover, the Court found that the inadequate visitation policies of the Board of Corrections unreasonably interferes with the prisoners' efforts to engage in rehabilitation, and in fact those policies decrease both social skills and the chances of successful reintegration into society. Given the inaccessibility of most of Alabama's penal institutions, infrequent visiting hours, and inadequate visiting facilities, there are few ways for inmates, many of whom are indigent, to communicate with friends and relatives outside the institution. Therefore, the defendants will be required to make available postage in reasonable amounts as one method of alleviating the unconstitutional conditions created in part by current visitation policies. Under these conditions, the requirement in the Court order as written will be modified so as to require defendants to supply postage and paper for each inmate, who so wishes, to write not less than two letters per week.

Eighth, defendants' request that shampoo be omitted from the list of personal hygiene items to be supplied to inmates will be granted.

Finally, defendants seek modification of Paragraph VIII §2 which presently requires that "[v]isitation policies must permit an inmate to receive visitors on at least a weekly basis." Repeated testimony by experts in these cases established that inmates suffer great disorientation and stress during their initial entry into the prison system, and that their adjustment to prison life may be greatly affected at that time. Consequently,

the Court will not modify that part of the order that prohibits defendants from denying visitation privileges to inmates at that critical period.

As to that part of defendants' motion for rehearing filed in these cases February 23, 1976, wherein defendants "move the Court to grant a rehearing on the gound that errors of law occurred before and during the trial hereof prejudicial to the defendants" and upon consideration of the specification of these "errors of law" as filed by defendants March 1, 1976, it appears that the motion for rehearing is absolutely without any merit and is due to be denied.

An order will be entered accordingly.

* * *

ORDER

Pursuant to the memorandum opinion of this Court made and entered herein this date, it is the ORDER, JUDGMENT and DECREE of this Court that:

1. Paragraph III §1 of Appendix A to this Court's order of January 13, 1976, be and is hereby modified to read

> By April 15, 1976, the defendants shall file with the Court a plan for the classification of all inmates incarcerated in the Alabama penal system. The Board of Corrections shall contract with the University of Alabama Department of Correctional Psychology, or some other comparably qualified agency or experts to be approved by the Court, to aid in the implementation of that plan.

2. Paragraph IV §3 be and is hereby modified to read

The defendants shall hire at least those mental health professionals and support personnel as set forth in Exhibit 9 of the Board of Corrections Report to the Court filed January 4, 1973, in *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972).

3. Defendants' motion that the minimum space required for each isolation cell be reduced be and is hereby denied. Further, Paragraph II of the order be and is hereby modified to read

1. No more than one prisoner shall be confined to a single cell, and each such cell shall be a minimum of 40 square feet. Within six months, the area of each single occupancy isolation cell shall be no less than 60 square feet.

2. Prison officials may, at their discretion, impose additional sanctions as further set forth below against inmates who are duly confined in punitive isolation according to the procedural requirements of *Wolff v. McDonnell*, 418 U.S. 539 (1974).

3. Each cell shall be equipped with a toilet which can be flushed from the inside; a sink with hot and cold running water, except that inmates in punitive isolation who consistently misuse plumbing facilities may be confined while in isolation in a cell equipped with no less than a toilet which can be flushed from the outside if such cell is closely supervised by correctional personnel; ventilation and lighting which meet minimum standards of the United States Public Health Service; clean linen; and a bed off the floor.

4. Each inmate confined in isolation shall be

(a) permitted to bathe at least every other day;

(b) provided three wholesome and nutritious meals per day served with eating and drinking

utensils, except that inmates in punitive isolation may be provided two meals per day if the total diet while in punitive isolation is nutritionally adequate;

(c) supplied the same toilet articles and linens as are required to be provided to the general inmate population;

(d) provided reading and writing materials; and allowed any personal legal or research materials, except that reading matter other than legal materials may be withheld from an inmate in punitive isolation for the period of such confinement;

(e) allowed at least 30 minutes of outdoor exercise per day; and

(f) afforded adequate medical and mental health care, including examination by a physician and a qualified mental health care professional at least every third day. No inmate shall be deprived of physical aids or prosthetic devices.

4. Defendants' motion to modify Paragraph VII §4 of the order which requires that a special diet be provided to inmates for reasons of health and religion be and is hereby denied.

5. Paragraph IX §1 be and is hereby modified to read

Each inmate shall be assigned a meaningful job on the basis of the inmate's abilities and interests, and according to institutional needs. Inmates shall not be required or allowed to perform household or personal tasks except within the institution; as part of a legitimate vocational, educational or work program; at state owned and operated facilities; or in the assistance of state governmental officials who may need such personal services to perform their official functions.

6. Paragraph VIII §1 be and is hereby modified to read

> Defendants shall not limit the number or length of letters a prisoner may send or receive. Mail to or from courts, attorneys or other public officials shall be inspected only for contraband and only in the presence of the prisoner to whom it is addressed or by whom it is mailed. Inspection or censorship of other mail must be in accordance with the standards set forth in *Procunier v. Martinez*, 416 U.S. 396 (1973). The defendants shall supply postage and paper for each inmate, who so wishes, to write not less than two letters per week.

7. Defendants' motion to modify Paragraph VIII §2 of the order to deny full visitation privileges for one month to inmates undergoing initial classification be and is hereby denied.

8. Defendants' motion to modify Paragraph II §5 of the order which requires that an inmate who is voluntarily segregated be released immediately upon request be and is hereby denied.

9. Paragraph VI §1 be and is hereby modified to read

> Prisoners shall be suppled, without charge, toothbrushes, toothpaste, shaving cream, razors and razor blades, soap, and combs. Each prisoner also shall be provided adequate clean clothing and a storage locker with a lock.

It is the further ORDER, JUDGMENT and DECREE of this Court that defendants' motion for a rehearing on the ground that errors of law occurred before and during the trial hereof prejudicial to defendants be and the same is hereby denied.

Done, this the 5th day of March, 1976.

/s/ [illegible]
UNITED STATES DISTRICT
JUDGE

APPENDIX G

[233]

IN THE

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed JAN 20 1975]

CIVIL ACTION NO. 74-57-N

JERRY LEE PUGH, for himself and all others similarly situated,

Plaintiffs,

v.

L.B. SULLIVAN, individually and in his official capacity as Commissioner of the Alabama Board of Corrections; et al.,

Defendants.

ORDER

Defendants' "Motion for Order Compelling Discovery" filed January 17, 1975, wherein defendants ask this Court to order the plaintiffs to answer certain interrogatories propounded to them by defendants, is ORDERED to be and is hereby granted.

It is further ORDERED that plaintiffs answer said interrogatories within 10 days from this date.

It is further ORDERED that plaintiffs' motion for leave to amend by adding as a party defendant Warden

H. Crouch of the G.K. Fountain Correctional Center be and is hereby granted.

It is further ORDERED that plaintiffs' motion for leave to amend by dropping all claims for class damages be and is hereby granted without prejudice to the right of any individual member of the plaintiff class to pursue independently his claim for damages for individual injuries.

It is further ORDERED that defendants' motion for trial by jury be and is denied for want of any issues triable to a jury remaining in this lawsuit.

Done, this the 20th day of January, 1975.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT
JUDGE

APPENDIX H

[332]

IN THE

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

[Filed JUN 27 1975]

CIVIL ACTION NO. 74-57-N

JERRY LEE PUGH, for himself and all others similarly situated,

Plaintiffs,

v.

L.B. SULLIVAN, individually and in his official capacity as Commissioner of the Alabama Board of Corrections; et al.,

Defendants.

ORDER

Upon consideration of the matters presented to the Court during the hearing conducted in this cause this date, it is ORDERED:

1. That plaintiffs' motion to sever plaintiffs' class action injunctive claims from the individual claims for damages asserted by plaintiff Pugh be and the same is hereby granted.

2. That defendants' motion filed June 6, 1975, asking this Court to dismiss the claims of the plaintiff

class for declaratory and injunctive relief be and the same is hereby denied.

3. That plaintiffs' motion seeking leave to amend filed June 13, 1975, be and the same is hereby granted.

4. That defendants file responsive pleadings to plaintiffs' complaint as amended June 13, 1975, within 10 days from this date.

5. That with the exception of defendants' response to plaintiffs' amended complaint, all pleadings in this case be and they are hereby closed.

6. That the attorneys for the parties prepare and present to this Court not later than July 10, 1975, a pretrial order outlining the issues for trial in this case.

7. That this cause be and the same is hereby consolidated for trial with *Worley James, et al. v. George C. Wallace, et al.*, Civil Action No. 74-203-N.

[333] 8. That the attorneys for the parties in this cause be and they are hereby bound by the cutoff dates and the trial date set forth in the order of this Court made and entered in *Worley James, et al. v. George C. Wallace, et al.*, on June 24, 1975.

Done, this the 27th day of June, 1975.

FRANK M. JOHNSON, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX I

[431]

IN THE

UNITED STATES DISTRICT COURTS FOR THE
SOUTHERN AND MIDDLE DISTRICTS
OF ALABAMA

[Filed AUG 29 1975]

CIVIL ACTION NO. 5620-69-H

ROBERT G. McCRAY,

Petitioner,

v.

L.B. SULLIVAN,

Respondent.

CIVIL ACTION NO. 6091-70-H

ROBERT G. McCRAY,

Petitioner,

v.

L.B. SULLIVAN,

Respondent.

CIVIL ACTION NO. 7094-72-H

JERRY WHITE and ALVIN CLAYBRONE,

Petitioners,

v.

COMMISSIONER OF ALABAMA
BOARD OF CORRECTIONS,

Respondent.

CIVIL ACTION NO. 74-57-N

JERRY LEE PUGH, for himself and all others similarly situated,

Plaintiffs,

v.

L.B. SULLIVAN, individually and in his official capacity as Commissioner of the Alabama Board of Corrections; et al.,

Defendants,

IRA DE MENT, United States Attorney,

Amicus Curiae.

CIVIL ACTION NO. 74-203-N

WORLEY JAMES, et al.,

Plaintiffs,

v.

GEORGE C. WALLACE, individually and in his official capacity as Governor of Alabama; et al.,

Defendants,

THE NATIONAL PRISON PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., and IRA DE MENT, United States Attorney,

Amici Curiae.

ORDER AND INJUNCTION

The plaintiffs in the above-captioned cases who are prisoners incarcerated by the State of Alabama in its penal system suing for themselves and for others similarly situated as prisoners in the Alabama prison system charge the defendant state officials who hold them in custody with massive and aggravated violations of the Eighth Amendment to the Constitution of the United States. The G. K. Fountain Correctional Institution, formerly known as the Atmore Prison Farm, and Holman Prison are located within the geographical limits of the Southern District of Alabama. The Mount Meigs Medical and Diagnostic Center and the Draper Prison are geographically situated in the Middle District of Alabama.

Evidence has been taken in each of the cases and the cases are now submitted.[1] Upon these submissions it clearly appears that the plaintiffs' Eighth Amendment rights have been and are being violated to the point that their continued incarceration under the conditions existing in the four prison facilities herein identified constitutes cruel and unusual punishment. The plaintiffs in all cases seek interim emergency relief by asking that the defendants be enjoined from accepting any new prisoners into the Alabama correction system until the population of each prison in the system is no greater than its stipulated designed capacity. The serious overcrowding in these facilities and the serious lack of custodial officers results in the almost complete inability on the part of the Alabama prison officials to control violence within these prisons; this violence includes, but is not limited to, stabbings and sexual assaults by inmates upon other inmates, on a regular and continued basis. Such conditions clearly dictate that the plaintiffs are entitled to interim emergency relief. Failure to grant this interim emergency relief designed to immediately commence a reduction in the prison facilities concerned will continue to subject the plaintiffs and the members of plaintiffs' class to these serious constitutional deprivations. This interim emergency relief is being granted jointly by the two judges having these cases under submission. The Middle District cases and the Southern District cases will otherwise be disposed of separately.

[1] Judge Hand in the Southern District cases has filed his findings and conclusions finding Eighth Amendment violations. In the Middle District Cases the defendants acknowledged, at the conclusion of the trial in open court, serious Eighth Amendment violations.

[433] Accordingly, it is the ORDER, JUDGMENT and DECREE of these Courts that L.B. Sullivan, individually and in his official capacity as Commissioner of the Alabama Board of Corrections; George C. Wallace, individually and in his official capacity as Governor of Alabama; The Alabama Board of Corrections; Yetta Samford, Jr., individually and as a member of the Alabama Board of Corrections; J.E. Vickers, individually and as a member of the Alabama Board of Corrections; Thomas F. Staton, individually and as a member of the Alabama Board of Corrections; Max V. McLaughlin, individually and as a member of the Alabama Board of Corrections; Thomas E. Bradford, Sr., individually and as a member of the Alabama Board of Corrections; the Wardens of G.K. Fountain Correctional Center, the Medical and Diagnostic Center, the Draper Prison, and the Holman Prison; their agents, assigns, successors in office, employees, and any others acting in concert with them, be and each is hereby ENJOINED from accepting or permitting the acceptance of any new prisoners, except escapees who have been apprehended and parole violators who have had their paroles revoked, into the Alabama penal system until the population of Draper Prison, G.K. Fountain Correctional Center, Holman Prison and the Mount Meigs Medical and Diagnostic Center is no greater than the designed capacity for said facilities.

It is further ORDERED that the United States Marshals for the Middle and Southern Districts of Alabama forthwith serve each defendant, including the Wardens of G.K. Fountain Correctional Center, Holman

and Draper Prisons and the Mount Meigs Medical and Diagnostic Center, with a copy of this injunction.

Done, this the 29th day of August, 1975.

/s/ Frank M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

/s/ W. B. Hand
UNITED STATES DISTRICT JUDGE

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT G. McCRAY,

Petitioner,

versus C.A. No. 5620-69-H

L.B. SULLIVAN,

Respondent.

ROBERT G. McCRAY,

Petitioner,

versus C.A. No. 6091-70-H

L.B. SULLIVAN,

Respondent.

JERRY WHITE and ALVIN CLAYBRONE,

Petitioners,

versus C.A. No. 7094-72-H

COMMISSIONER OF ALABAMA
BOARD OF CORRECTIONS,

Respondent.

ORDER

In its Order of August 7, 1975, this Court disposed of the issues raised by Civil Action 7094-72-H; allowed amendment of Civil Actions 5620-69-H and 6091-70-H to permit them to proceed as class actions, and continued same for further study. On August 29, 1975 a joint Order in this and other cases was issued with

Judge Frank M. Johnson, Jr. of the Middle District, enjoining prison authorities from accepting any more prisoners in any of the State institutions until such time as those institutions had a prison population no greater than the design capacity of said respective facilities,[1] which injunction is still in force and effect. By further joint Order dated October 9, 1975, the Courts allowed a clarification of the aforesaid injunction permitting administrative transfer of prisoners within the prison system without the necessity of having to transport the body through overburdened institutions.

Having therefore reserved judgment on the remaining issues in this case pending possible action by the 1975 Legislature, which was then in session to fashion some relief, and the Legislature having adjourned without addressing itself fully to the question, and the Courts having taken additional testimony on the problem, determines that further order is now appropriate.

As heretofore set forth in the August 7, 1975 Order, G.K. Fountain Correctional Center, Draper Correctional Center, Holman Unit and Medical and Diagnostic Center are grossly overpopulated and grossly understaffed, proximately resulting in conditions that give rise to sub-human treatment of the inmates incarcerated therein, a condition which this Court found to be

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[1] *Robert G. McCray v. L.B. Sullivan,* Civil Action 5620-69-H; *Robert G. McCray v. L.B. Sullivan,* Civil Action 6091-70-H; *Jerry White and Alvin Claybrone v. Commissioner of Alabama Board of Corrections,* Civil Action 7094-72-H; *Jerry Lee Pugh v. L.B. Sullivan, et al., Ira De Ment, U.S. Attorney, Amicus Curiae,* Civil Action 74-57-N; and *Worley James, et al. v. George C. Wallace, et al., The National Prison Project of the American Civil Liberties Union Foundation, Inc. and Ira De Ment, U.S. Attorney, Amicus Curiae,* Civil Action 74-203-N.

violative of the Constitution of the United States. The only relief that appears on the horizon is the passage of a bond issue that would permit certain corrective measures to be taken in the physical plants of the various institutions, and the reduction in population resulting from the injunction of the Courts.

It has been urged upon this Court, and others, that definitive order should issue specifying what would meet Constitutional muster in this type case. Such advocacy requires of this Court that it give a declaratory judgment or an advisory opinion on what is meant by cruel and inhuman punishment as prohibited by the Constitution. Neither this nor any other Court has infinite wisdom or a crystal ball that would permit it to one time determine what other judges might agree is required by the circumstances presented to them by the facts in these cases and for this reason this Court will not attempt to undertake such an effort.

It is and should be the province and burden of the State and those departments responsible, to undertake corrective action to provide the minimum requirements of a system that does not impose cruel and inhuman punishment upon inmates incarcerated by it. This Court is of the opinion that it does not possess and should not assume authority to direct the exact means or method to be pursued by the State in discharging such duties. Suffice it to say that if the State fails to properly discharge such duties of providing and operating its prison facilities in a manner which no longer infringes upon the Constitutional rights of the inmates it may become necessary to enjoin further use of such facilities for the incarceration of prisoners.

The Board of Corrections and Commissioner has previously indicated to this Court and they are unable,

under present funding, to undertake any meaningful corrective measures. Bond funds have now been authorized and it is hoped that the Legislature, which convenes in May, will provide additional funds and means sufficient to enable the State to discharge its duties with respect to its prison facilities. In light of this it is therefore ORDERED that the defendants provide this Court within 90 days a written report of the present condition of the prison system as it affects the institutions specified herein; the contemplated use of the bond funds authorized by the people of the State of Alabama; the effect of such use on present conditions in the various institutions; time schedule of such implementation; and the recommendations it proposes to make to the next session of the Legislature for additional or further relief.

It is further ORDERED that the defendants make a supplemental report in writing within 180 days reflecting the then conditions of the prisons and the success, if any, to be derived from legislative action. Unless such reports indicate probable success in alleviating the present conditions within the foreseeable future and unless the Legislature shows a willingness to address itself forcefully to the problem with legislation that speaks affirmatively to the solution of the overcrowding, understaffing and administration of the present penal system, then this Court will again review the matter with the view towards other appropriate

action. The Court retains jurisdiction pending further orders.

DONE this 10th day of February, 1976.

/s/ W.B. HAND
UNITED STATES DISTRICT
JUDGE

U.S. DIST. COURT
SOU. DIST. OF ALA.
FILED AND ENTERED THIS THE
10TH DAY OF FEBRUARY, 1976
MINUTE ENTRY NO. 40007
WILLIAM J. O'CONNOR, CLERK
BY:
/s/ J. BETANCOURT
Deputy Clerk.

Supreme Court, U. S.
FILED
APR 6 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1107

STATE OF ALABAMA,
JUDSON C. LOCKE, JR., GEORGE C. WALLACE, *et al.*,
Petitioners,

v.

N. H. NEWMAN,
JERRY LEE PUGH, WORLEY JAMES, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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N. H. NEWMAN,
JERRY LEE PUGH, WORLEY JAMES, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI[1]

The Respondents in the above-styled consolidated cases, who together represent all persons confined by the Alabama Board of Corrections or who may be so confined in the future, hereby oppose the petition for a writ of certiorari filed by the petitioners to review a judgment of the United States Court of Appeals for the Fifth Circuit reported as *Newman v. State of Alabama,* 559 F.2d 283 (5th Cir. 1977).

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[1] The respondents herein have filed simultaneously herewith a conditional cross-petition for a writ of certiorari. See *N.H. Newman, et al. v. State of Alabama, et al.*, No. O.T. 77 _____ .

QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the question of whether the Court of Appeals and the District Court abused their discretion in approving and adopting equitable relief necessary to remedy conceded massive constitutional violations in the Alabama Prison system when the record reflected that those violations had continued unabated for years and particularly when the record reflected non-compliance with the District Court's previous order covering some of the same issues?

2. Should this Court grant certiorari to review the question of whether an injunction issued against the State of Alabama and the Alabama Board of Corrections violates the Eleventh Amendment or exceeds a federal court's authority under 42 U.S.C. 1983, when no damages against the State or the Board were sought, when the injunction also was directed to numerous Alabama prison officials including the members of the Alabama Board of Corrections and when the State of Alabama and the Board of Corrections were only named as defendants in one of two consolidated class actions before the Court?

3. Should this Court grant certiorari to review the question of whether the Seventh Amendment required the trial judge to submit two consolidated class actions requesting equitable relief to a jury instead of severing the individual monetary damage claims of one named plaintiff in one of the cases?

STATEMENT OF THE CASE

This case proceeded in the District Court on the basis of two separate complaints by prisoners in the Alabama prison system who sought declaratory and injunctive relief pursuant to 42 U.S.C. 1983 for deprivation of their rights under the Eighth and Fourteenth Amendments.[2] The amended complaint in *James v. Wallace*, C.A. No. 74-203-N, asked for injunctive relief against both specific constitutional violations and the totality of unconstitutional conditions of confinement in the Alabama prison system. The amended complaint in *Pugh v. Locke*, C.A. No. 74-57-N, asked for similar injunctive relief, but also contained an individual request for monetary damages by the named plaintiff Pugh relating to a single assault incident. Each case proceeded as a class action – *James* on behalf of all persons confined by the Alabama Board of Corrections or who might be so confined in the future, and the equitable claims in *Pugh* on behalf of those prisoners who were or might be confined at one of Alabama's prisons, the G.K. Fountain Correctional Center. At the request of Pugh, his individual damage claims were severed from the class claim for declaratory and injunctive relief and the two cases were consolidated for trial.

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[2] The District Court's post-trial findings of fact and conclusions of law included findings and conclusions that its three-year-old order in *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. den.*, 421 U.S. 948 (1975), relating to medical care in the Alabama prison system had not been complied with. (A. 43, 44, 61, 62) (All appendix references are to the appendix in the petition for a writ of certiorari and are designated (A.). Because the same issues were among the issues raised in *James* and *Pugh*, the District Court consolidated the three cases for the purposes of implementing its original order in *Newman*. (A. 69, 70).

The trial of the consolidated cases lasted seven days and included the extensive and virtually uncontradicted testimony of eight nationally known experts in corrections, correctional psychology and public health who testified for the plaintiffs and *amici*.[3] In addition, the court had before it over 450 photographs, numerous depositions and exhibits as well as over 1,000 stipulated facts. The state officials rested their case without presenting any substantial contradictory evidence and "The trial concluded with the admission by defendants' lead counsel, in open court, that the evidence conclusively established aggravated and existing violations of plaintiff's Eighth Amendment rights." (A. 36)

The trial court subsequently entered an order incorporating extensive findings of fact and conclusions of law. The findings and conclusions related to virtually every aspect of the Alabama system and found that confinement under the totality of conditions in the Alabama prison system violated the prisoners' rights under the Eighth and Fourteenth Amendments. The district court found, *inter alia*, that "the four principal institutions are horrendously overcrowded." (A. 37); "that inmates have to sleep on mattresses spread on floors in hallways and next to urinals." (A. 39); that Alabama's prisons "are overrun with roaches, flies, mosquitoes, and other vermin," (A. 40); that "many toilets will not flush and are overflowing," (A. 40); that "some inmates drink from used tin cans," (A. 41); that a public health officer found the four major prisons "wholly unfit for human habitation," (A. 42); that "there is no

[3] The United States Attorney for the Middle District of Alabama participated in the trial as one of two *amici* and the United States, by the Department of Justice, participated as *amicus* in the Court of Appeals.

working classification system in the Alabama penal system," (A. 42); that "robbery, rape, extortion, theft and assault are everyday occurrences among the general inmate population," (A. 45); that "even if the inmate population were reduced to design capacity, the system would still be woefully understaffed," (A. 46); that "the rampant violence and jungle atmosphere existing throughout Alabama's penal institutions are no surprise," (A. 48); that "the indescribable conditions in the isolation cells required immediate action to protect inmates from any further torture by confinement in those cells," (A. 55); and that "these conditions create an environment that not only makes it impossible for inmates to rehabilitate themselves but also makes dehabilitation inevitable" (A. 49). The District Court then issued an injunction to remedy these massive constitutional violations. In addition, in light of the total non-compliance of the defendants with the prior *Newman, supra,* order on medical care and the clear knowledge of the state officials of the unconstitutional conditions which had existed for years, the court appointed a Human Rights Committee to assist it in monitoring future compliance.

The petitioners did not request a stay of the trial court's order but did appeal that order to the Court of Appeals.[4] The petitioners did not challenge and the Court of Appeals expressly approved the District Court's detailed findings concerning the "indefensible conditions" in Alabama's prisons (A. 7). The Court of Appeals did modify a few features of the District Court's order by deciding that they could be replaced by "less intrusive, but equally effective measures" (A. 10). Among the modifications was a directive by the Court of Appeals to the District Court to appoint individual monitors to report on compliance at each

[4] Indeed, many of the changes ordered by the District Court have already been complied with by the Alabama officials.

prison rather than maintaining the Human Rights Committee. The vast majority of the District Court's remedial measures were upheld as being necessary to correct specific constitutional violations and to correct the totality of violations under the Eighth and Fourteenth Amendments. The respondents were granted until April 6, 1978 to file their brief in opposition to the petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE REMEDY ADOPTED BY THE COURT OF APPEALS WAS APPROPRIATE TO CORRECT CONCEDED MASSIVE CONSTITUTIONAL VIOLATIONS.

In determining whether the standards for plenary review by this Court under Rule 19 have been met, it is important at the outset to delineate clearly what is at issue. The petitioners do not challenge and the Court of Appeals approved the detailed and exhaustive findings of the District Court that by any contemporary societal standards, the conditions of confinement in the Alabama prison system were shocking to the conscience of reasonably civilized people and bore no reasonable relationship to any legitimate institutional goals or valid governmental interest.[5] Nor could those findings be challenged in light of the virtually uncontested testimony at trial and the petitioners' admission that the plaintiffs were entitled to relief because of aggravated and wholesale Eighth Amendment violations.

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[5] The barbaric and inhumane conditions in the Alabama prison system as well as Judge Johnson's ordered remedies have already been noted by this Court in *Dothard v. Rawlinson*, 433 U.S. 321, 334, 336, n. 23 (1977).

As the Court of Appeals initially recognized, the only real issue before it was an appraisal of whether the District Court abused its broad discretion in prescribing the appropriate remedies to cure the admitted massive constitutional violations. A District Court is in the best position, having heard all of the evidence, to make the decision on the appropriateness of particular remedies. As the Court of Appeals pointed out in another context, in discussing the decision of the trial judge in this case, "[a] federal district court [is] closer to the situation than we are . . ." *Jackson v. Alabama*, 530 F.2d 1213, 1244, n. 9. (5th Cir. 1976), and its decision should only be overturned in the face of an evident abuse of discretion or clearly erroneous factual findings. Neither of those determinations can be or were made in this case. Similarly, the issue raised in the petition for certiorari is only whether those remedies as modified by the Court of Appeals, are so abusive of their discretion and "so far depart from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 19(b).

It is well-settled by this Court that once a constitutional violation is found the scope of the remedy is determined by the nature and extent of the constitutional violation; that the remedy can be aimed at eliminating a condition that violates the Constitution or flows from such a violation; and that the court's equitable powers to remedy violations is broad and flexible and must be molded by the necessities of the situation, *Milliken v. Bradley*, 433 U.S. 267 (1977); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *State of Alabama v. United States*, 304 F.2d 583 (5th Cir. 1962), *aff'd*, 371 U.S. 37 (1962).[6]

[footnote 6 on next page]

The need for every aspect of the District Court's order is fully supported by the evidence in the case and the petitioners do not specify any part of the order, as modified by the Court of Appeals, which was not needed to correct the admitted constitutional violations found to exist in the Alabama prison system. This is undoubtedly because in determining the appropriate remedy, the District Court and the Court of Appeals each recognized the discretion normally granted to state officials and were careful to construct relief geared only to correcting the massive constitutional violations. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The appointment of monitors to observe actions of the Petitioners and to report to the Court on compliance or non-compliance is the only requirement specifically complained of by the Petitioners. Clearly, it was within the broad equitable powers of the Court to use such monitors as a part of a plan calculated realistically to work in correcting violations. *Milliken, supra,* at 280; *Green v. County School Board of New Kent County*, 391 U.S. 430, 439 (1968). The monitors were particularly necessary in light of the uncontradicted evidence that massive violations of

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6 (continued from previous page)

The attempted reliance of the Petitioners on *Rizzo v. Goode*, 423 U.S. 362 (1976), is misplaced. In that case the plaintiffs were found not to have met requisite Art. III case or controversy standards. Further, the district court was criticized for granting far reaching equitable relief against City of Philadelphia officials based upon 20 police-citizen incidents which apparently occurred without the participation or approval of police officials. Unlike the situation in Alabama, ". . . where the state authorities had implemented the unconstitutional deprivation, the responsible authorities [in Philadelphia] were not found to have played an affirmative part in any unconstitutional deprivations." *Id.* at 377.

the rights of prisoners had existed for years with full knowledge of the petitioners *and* that they had totally failed to comply with a three-year-old order to meet minimal constitutional conditions for medical care. *See, Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. den., McDonough v. Morgan*, __U.S. __, 97 S. Ct. 743 (1977); *Inmates of Attica Correctional Facility v. Rockefeller*, 453 F.2d 12 (2nd Cir. 1971).

Faced with perhaps the most outrageous and massive Eighth and Fourteenth Amendment violations ever examined by a federal court, the remedy ordered was not only within the equitable powers of the lower court but was constitutionally mandated. *Pell v. Procunier*, 417 U.S. 817, 827 (1974).

II. INJUNCTIVE RELIEF AGAINST THE STATE OF ALABAMA AND THE ALABAMA BOARD OF CORRECTIONS.

Supreme Court Rule 19(1) states that certiorari will only be "granted where there are special and important reasons therefor." The second issue raised by the Petitioners challenges the injunction against the State of Alabama and the Alabama Board of Corrections alleging: (1) each is immune from suit under the Eleventh Amendment; (2) neither is a "person" subject to 42 U.S.C. 1983 jurisdiction; and (3) *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Ex Parte Young*, 209 U.S. 123 (1908) bar judgments against the State for prospective costs of compliance with an order. Under the facts of these cases, the questions presented are not only unimportant but are essentially irrelevant.

First, additional defendants enjoined include all members of the Alabama Board of Corrections and numerous other prison officials who would clearly remain bound by the

injunction issued, *Scheuer v. Rhodes,* 416 U.S. 232 (1974); *Edelman v. Jordan,* 415 U.S. 651 (1974) and have the authority in their official capacity to carry out the court's orders. Second, the State of Alabama and the Board of Corrections were only named defendants in the *Pugh* case and not the *James* case. Therefore, any action taken on this issue in *Pugh* would not affect the same relief granted in *James.* Third, this issue was never thought important enough by counsel for the petitioners to raise, brief or argue in the trial court. Fourth, the Court of Appeals did not see fit to speak to this issue at all. Fifth, whether the State of Alabama and/or the Board of Corrections are enjoined in addition to the members of the Board of Corrections has absolutely no practical effect on what has happened or will happen under the court's order.

III. SEVERANCE OF THE INDIVIDUAL DAMAGES DEMAND OF THE NAMED PLAINTIFF IN *PUGH v. LOCKE.*

The third claim of the petitioners is that these two consolidated class actions should have been tried before a jury and not by the court because of the individual damage claim of the named plaintiff in *Pugh v. Locke.* Under the facts of these cases, there are certainly no special and important reasons for the Court to grant certiorari on this issue. Supreme Court Rule 19(1).

Again, the consolidated case of *James v. Wallace,* which was a system-wide class action, only asked for declaratory and injunctive relief. Therefore, even if the *Pugh* case were to be reversed and sent back to the trial court for all common legal and equitable issues to be tried by a jury, the class action equitable relief granted in the *James* case would still stand.

Moreover, the severance of Pugh's individual damage claim did not deprive the defendants in that case of their right to a jury trial. The issues of fact and law are not common to and do not result in collateral estoppel or *res judicata* to facts or legal issues in Pugh's individual damage claim since that claim arises solely out of an alleged assault upon him in August 1973, after he requested to be transferred for his personal safety. The facts in that case were not presented in the cases tried below. Further, the issues in that case will involve the personal involvement and culpability of each defendant relating to that particular incident. Therefore, the cases of *Curtis v. Loether,* 415 U.S. 189 (1974); *Ross v. Bernhard,* 396 U.S. 531 (1920); *Dairy Queen, Inc. v. Wood,* 369 U.S. 569 (1962); and *Beacon Theatre, Inc. v. Westover,* 359 U.S. 500 (1959), cited by the Petitioners, are totally inapplicable.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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